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# IS IT REALLY A CHOICE? HOW CHARTER SCHOOLS WITHOUT CHOICE MAY RESULT IN STUDENTS WITHOUT A FREE APPROPRIATE PUBLIC EDUCATION

*Erin Hankins Diaz\**

## I. INTRODUCTION

During July of 2014, The Detroit Free Press reported on the culmination of a year-long investigation of Michigan's charter schools.<sup>1</sup> The Free Press found that while charter schools were spending one billion dollars in tax money each year, charter schools lacked transparency in their spending.<sup>2</sup> The report reviewed the successes and failures of charter schools and their authorizers throughout the state; however, the report gave little if any coverage to how well charter schools in Michigan educated students with disabilities.<sup>3</sup> One month after the Free Press's exposé, eleven of the forty charter school authorizers in Michigan faced potential suspension due to oversight deficiencies.<sup>4</sup>

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<sup>1</sup> *State of Charter Schools: How Michigan Spends \$1 Billion but Fails to Hold Schools Accountable*, DETROIT FREE PRESS (July 16, 2014), <http://www.freep.com/interactive/article/20140622/NEWS06/140507009/State-charter-schools-How-Michigan-spends-1-billion-fails-to-keep-schools-accountable> [hereinafter *State of Charter Schools*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Lori Higgins, *11 Charter School Authorizers Risk State Suspension for Deficiencies*, DETROIT FREE PRESS (Aug. 11, 2014), <http://www.freep.com/article/20140811/NEWS06/308110130/charter-schools-Michigan-suspension>. Muskegon Heights Public School District, which chartered for the Muskegon Heights Public School Academy, was one of the eleven districts at risk for suspension. *11 Authorizers Put "At Risk of Suspension" to Create Future Charter Schools*, MICH. DEP'T EDUC. (Aug. 11, 2014), <http://www.michigan.gov/mde/0,4615,7-140-334791-,00.html>; PUBLIC SCHOOL ACADEMIES BY AUTHORIZER, MICHIGAN.GOV (2014),

While some charter school authorizers across Michigan face suspension, local school districts have endured budget crises across Michigan<sup>5</sup> and the United States.<sup>6</sup> Though federal funding has remained relatively constant, state and local funding for education has decreased for various reasons.<sup>7</sup> Recognizing this issue, in 2009 the federal government allocated \$48.6 billion to help ensure that educational services would remain intact in spite of financial difficulties.<sup>8</sup> Facing financial issues in Michigan, emergency managers, appointed by the governor,<sup>9</sup> unilaterally changed the school districts in Muskegon Heights and Highland Park into privately run charter school systems to save money.<sup>10</sup> This was a trailblazing move in education since for the first time in the United States, the only public schools within the districts were charter

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[http://www.michigan.gov/documents/mde/Schools\\_by\\_Authorizer\\_396738\\_7.pdf](http://www.michigan.gov/documents/mde/Schools_by_Authorizer_396738_7.pdf).

<sup>5</sup> Inkster and Buena Vista school districts were dissolved in 2013 due to financial issues and decreasing enrollment. Chastity Pratt Dawsey, *Buena Vista, Inkster Students Headed Elsewhere as Districts are Dissolved*, DETROIT FREE PRESS (July 22, 2013), <http://www.freep.com/article/20130722/NEWS06/307220043/buena%20vista%20inkster%20schools%20deadline>; Kathleen Gray & Lori Higgins, *Snyder Signs Bill That Spells End for Buena Vista and Inkster Schools*, DETROIT FREE PRESS (July 2, 2013), <http://www.freep.com/article/20130702/NEWS06/307020105/inkster-buena-vista-schools-district-dissolution>.

<sup>6</sup> Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 898–900 (2010) (proposing conditions for receiving federal funding that would require states to help school districts save money, monitor school districts' spending, and stabilize education funding); see Alex P. Kellogg, *U.S. News: Detroit Schools on the Brink—Shrinking District Heads Toward Bankruptcy to Gain Control of Its Costs*, WALL ST. J., Jul. 21, 2009, at A3 (explaining the potential for Detroit Public Schools to declare municipal bankruptcy due to the fiscal crisis that the district faced as enrollment declined and budget deficits increased in 2009).

<sup>7</sup> Some of the various reasons that state and local funding have decreased are less revenue from income taxes due to fewer jobs; property taxes because of property values decreasing while foreclosures have increased; and decreased sales tax revenue, resulting from less consumer spending. Bowman, *supra* note 6, at 903.

<sup>8</sup> U.S. Dep't of Educ., *State Fiscal Stabilization Fund*, ED.GOV (Mar. 7, 2009), <http://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html> (explaining how the American Recovery and Reinvestment Act of 2009 created the State Fiscal Stabilization Fund to prevent cuts to education).

<sup>9</sup> When a school district faces fiscal crisis, depending on the state, federal and state laws provide three possible ways to aid the district: municipal bankruptcy, state receivership, and fiscal takeover mechanisms. Bowman, *supra* note 6, at 930. The appointment of Emergency Managers is an example of a fiscal takeover mechanism. *See id.* at 928–30.

<sup>10</sup> David Arsen & Mary L. Mason, *Seeking Accountability Through State-Appointed Emergency District Management*, 27 EDUC. POL'Y 248, 266 (2013); Katie Ash, *Private Firms Run Two Mich. Districts*, EDUC. WEEK, May 2013, 12, at 12; Kristi L. Bowman, *State Takeovers of School Districts and Related Litigation: Michigan As a Case Study*, 45 URB. L. 1, 15 (2013).

schools.<sup>11</sup> With the economic and education crises that many school districts face and the increased prevalence of charter schools, students with special education needs may be at risk due to the increased cost of adequately educating students with special needs.<sup>12</sup>

This comment focuses on the issues that arose as two school districts in Michigan made a groundbreaking decision to become all-charter school districts when faced with funding issues, while still attempting to provide appropriate education for all students, especially those who qualify for special education services.<sup>13</sup> Parents across the United States have made the choice to place their children in charter schools for various reasons, including dissatisfaction with their current public school's reputation, services, and general education program.<sup>14</sup> Charter schools, a hybrid form of school, mixing elements commonly found in public and private schools,<sup>15</sup> have not been shown to educate students any better than public schools nationally.<sup>16</sup> In Michigan, students with disabilities in charter schools are not doing as well in reading and math as their counterparts in traditional public schools.<sup>17</sup> Despite being public schools, charter schools throughout the United States continue to enroll a lower population of students with special education needs.<sup>18</sup> As public schools, charter schools are

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<sup>11</sup> *Muskegon Heights Schools Were in Trouble. Then the District Made History. Twice.*, MICH. RADIO (Jul. 24, 2014), <http://stateofopportunity.michiganradio.org/post/muskegon-heights-schools-were-trouble-then-district-made-history-twice>.

<sup>12</sup> See, e.g., CITIZENS RESEARCH COUNCIL OF MICH., PUBLIC EDUCATION GOVERNANCE IN MICHIGAN at i (2010), <http://crcmich.org/PUBLICAT/2010s/2010/rpt359.pdf> [hereinafter CRC PUBLIC EDUCATION]; see *infra* note 26.

<sup>13</sup> See *infra* Parts II, III.

<sup>14</sup> Rebekah Gleason, *Looking Back and Moving Forward: New Approaches to Legal Advocacy in the 21st Century: Charter Schools and Special Education. Part of the Solution or Part of the Problem?*, 9 UDC/DCSL L. REV. 145, 153 (2007).

<sup>15</sup> GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS?: LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 2 (2002).

<sup>16</sup> Joy Resmovits, *Charter School Growth in Michigan Brings Cautionary Tale on Quality*, HUFFPOST DETROIT (Feb. 1, 2013), [http://www.huffingtonpost.com/2013/01/17/charter-school-quality\\_n\\_2490931.html](http://www.huffingtonpost.com/2013/01/17/charter-school-quality_n_2490931.html).

<sup>17</sup> See CREDO, CHARTER SCHOOL PERFORMANCE IN MICHIGAN 27 (2013), [http://credo.stanford.edu/pdfs/MI\\_report\\_2012\\_FINAL\\_1\\_11\\_2013\\_no\\_watermark.pdf](http://credo.stanford.edu/pdfs/MI_report_2012_FINAL_1_11_2013_no_watermark.pdf) [hereinafter CREDO MICHIGAN].

<sup>18</sup> CREDO, NATIONAL CHARTER SCHOOL STUDY 16 (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> [hereinafter CREDO NATIONAL]; In Michigan, there were about three percent more children in special education in traditional public schools compared to charter schools. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL

responsible for providing children with disabilities with an appropriate education, so the difference in enrollment is odd.<sup>19</sup> While the reasons for the discrepancy remain uncertain, some parents have shared stories of their children being turned away from charter schools due to their child's disability.<sup>20</sup> Additionally, some charter schools choose not to identify children with disabilities, and some are not able to provide the resources needed for special education.<sup>21</sup> In 2012, two school districts in Michigan completely removed parents' choice in education by turning the entire public school district over to charter schools, effectively forcing parents to send their children to a charter school if they wanted to stay within their own school district.<sup>22</sup>

Though the "public school academy"—the term used for a charter school in Michigan—is a not-for-profit corporation,<sup>23</sup> the school board for the public school academy can contract with a for-profit company to run the school.<sup>24</sup> As of 2014, Michigan has more for-profit companies in charge of charter schools than any other state.<sup>25</sup> A for-profit entity will naturally be taking cost into account, and in Michigan, the cost to educate a student with special education services is almost twice as much as

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ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 8 (2012), <http://files.eric.ed.gov/fulltext/ED533002.pdf> [hereinafter GAO CHARTER SCHOOLS]; see Stephanie Banchemo & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J. (June 19, 2012), <http://online.wsj.com/news/articles/SB10001424052702303379204577477003893836734>.

<sup>19</sup> McLaughlin & Rhim, *Accountability Frameworks and Children with Disabilities: A Test of Assumptions About Improving Public Education for All Students*, 54 INT'L J. DISABILITY, DEV. & EDUC. 25, 37 (2007).

<sup>20</sup> Banchemo & Porter, *supra* note 18. *But see* MARCUS A. WINTERS, UNDERSTANDING THE CHARTER SCHOOL SPECIAL EDUCATION GAP: EVIDENCE FROM DENVER, COLORADO 1–4 (2014), [http://www.crpe.org/sites/default/files/CRPE\\_Specialized\\_Denver\\_Report.pdf](http://www.crpe.org/sites/default/files/CRPE_Specialized_Denver_Report.pdf) (positing that in Manhattan, New York and Denver, Colorado, the difference in proportions of students with special needs in charter schools is not due to counseling out students, but due to a variety of other factors such as parents choosing to keep their children in traditional schools and how charter schools categorize children with special needs).

<sup>21</sup> *See infra* Part II.A.

<sup>22</sup> Ash, *supra* note 10.

<sup>23</sup> CRC PUBLIC EDUCATION, *supra* note 12, at 18.

<sup>24</sup> MICH. DEP'T OF EDUC., MICHIGAN CHARTER SCHOOLS-QUESTIONS AND ANSWERS 15 (2012), [http://www.michigan.gov/documents/PSAQA\\_54517\\_7.pdf](http://www.michigan.gov/documents/PSAQA_54517_7.pdf). Though in Michigan charter schools are called public school academies, this comment uses the term "charter school" to refer to the schools for clarity since that is the more commonly known name.

<sup>25</sup> *State of Charter Schools*, *supra* note 1.

educating a child without those services.<sup>26</sup> Federal policy regarding special education focuses on procedural compliance<sup>27</sup>—which includes creating a service plan and providing resources that contribute to the increased expense to educate a child with a disability—rather than outcomes, which is how the effectiveness of charter schools is measured.<sup>28</sup> In Michigan, students in special education in charter schools have made fewer gains than their counterparts in traditional public schools.<sup>29</sup> Furthermore, the flexibility that is the hallmark of charter schools conflicts with mandates to offer special education services.<sup>30</sup> Since unaddressed special education needs can lead to truancy and are one of the common factors among juveniles in the criminal justice system, addressing students' educational needs is beneficial to the public.<sup>31</sup>

While Michigan, as the first state to adopt an all-charter

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<sup>26</sup> The per pupil foundation allowance for Muskegon Heights and Highland Park Public School Academies was \$7,391 in fiscal year 2016. MICH. DEPT OF EDUC., FOUNDATION AMOUNTS FOR FY 2016 10, 15 (2016), [http://www.michigan.gov/documents/cyfound\\_11728\\_7.pdf](http://www.michigan.gov/documents/cyfound_11728_7.pdf). The cost to educate a child in special education classes was on average \$14,397 in fiscal year 2010. CITIZENS RESEARCH COUNCIL OF MICH., FINANCING SPECIAL EDUCATION: ANALYSES AND CHALLENGES v–vi (2010), <http://www.crcmich.org/PUBLICAT/2010s/2012/rpt378.pdf> [hereinafter CRC FINANCING SPECIAL EDUCATION].

<sup>27</sup> Press Release, Department Announces New Effort to Strengthen Accountability for Students with Disabilities: Moving from Compliance-Focused Approach to One Driven by Results, Dep't of Educ. (Mar. 2, 2012), <http://www.ed.gov/news/press-releases/department-announces-new-effort-strengthen-accountability-students-disabilities>.

<sup>28</sup> Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 666 (2012).

<sup>29</sup> See CREDO MICHIGAN, *supra* note 17, at 27.

<sup>30</sup> Garda, *supra* note 28, at 680. Charter schools operate on the idea that with fewer restrictions than traditional public schools, their teachers can teach what they want in the manner they want, achieving education reform. *Id.* Charter schools gain freedom from general education regulations as long as they achieve specified outcomes. *Id.* at 666. However, laws regulating special education mandate that certain procedures are followed to ensure a child receives an appropriate education. *Id.* at 674–75. Thus, the regulations judge compliance based on process rather than outcomes. *Id.* Therefore, the flexibility in curriculum and process that charter schools strive for will not align with the procedural requirements of special education law. *Id.* at 680.

<sup>31</sup> Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28 (2003) (describing some situations where children were not identified in school as having disabilities until they had encounters with the justice system and the responsibilities that government actors have toward youth with disabilities who encounter the justice system); *Truancy Fact Sheet*, EDUCATION.COM (July 16, 2010), <http://www.education.com/reference/article/truancy-fact-sheet>.

school district,<sup>32</sup> may be on the forefront of this change in hybrid education in the United States, other states may not be far behind, considering that internationally, schools have had hybrid structures in education for much longer.<sup>33</sup> Because of the charter school laws in other states that make the charter school its own local educational agency (LEA),<sup>34</sup> children with disabilities may face the same issues with being counseled out or not being provided resources at their public school.<sup>35</sup> To address the issues of charter schools educating fewer children with disabilities; not identifying children with disabilities; and not providing appropriate resources; there must be federal legislation that applies specifically to all-charter school districts, requiring more oversight to ensure that these schools are providing appropriate special education services.<sup>36</sup> The federal legislation should include a provision that prohibits all-charter school districts from functioning as an LEA, due to the funding constraints that charter schools will face as a result of their size.<sup>37</sup> Additionally, parents should be informed about their child's right to special education resources, so the parents can be more involved in the creation and implementation of individualized education programs within charter schools, enabling parents to advocate for their child.<sup>38</sup>

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<sup>32</sup> See Arsen & Mason, *supra* note 10, at 266.

<sup>33</sup> The Dutch system currently in place was established in 1917. HARRY ANTHONY PATRINOS, PRIVATE EDUCATION PROVISION AND PUBLIC FINANCE: THE NETHERLANDS 5 (2009), [http://www.vanderbilt.edu/schoolchoice/conference/papers/Patrinos\\_COMPLETE\\_with%20page%20numbers.pdf](http://www.vanderbilt.edu/schoolchoice/conference/papers/Patrinos_COMPLETE_with%20page%20numbers.pdf). With one of the oldest school choice systems, the Netherlands utilizes freedom to establish schools based on whatever principles the organizers desire, with the school funded by the government. HARRY ANTHONY PATRINOS ET AL., THE ROLE AND IMPACT OF PUBLIC-PRIVATE PARTNERSHIPS IN EDUCATION 8 (2009), [http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079934475/547667-1135281523948/2065243-1239111225278/Role\\_Impact\\_PPP\\_Education.pdf](http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079934475/547667-1135281523948/2065243-1239111225278/Role_Impact_PPP_Education.pdf). Since the 1980s, Chile has utilized a universal voucher system where parents can choose between private and public schools. *Id.* at 30. However, the system resulted in declining public schools and private schools that chose the brightest and more affluent students. *Id.*

<sup>34</sup> 34 C.F.R. § 300.28 (2013). Under IDEA's implementing regulations, a Local educational agency or LEA means a public board of education or other public authority legally constituted within a State for either administrative control or direction of or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. *Id.*

<sup>35</sup> See *infra* Part II.A.

<sup>36</sup> See *infra* Part IV.

<sup>37</sup> Gleason, *supra* note 14, at 158.

<sup>38</sup> See *infra* text accompanying notes 358–368.

To understand the seriousness of the issue facing some children with disabilities, one must understand the history of special education and charter schools along with the how federal and state law within these areas interact. This comment proceeds in four parts. Part I focuses on the legislation mandating special education services and the funding structure established by the federal government and state government, with Michigan as an example. Part II discusses charter schools and special education, focusing specifically on the charter school movement in Michigan and its all-charter school districts. Part III examines the issue of compliance oversight regarding special education services. Finally, Part IV discusses federal legislation as a possible solution to ensure that students in all-charter school districts receive appropriate special education services when they no longer have a choice to attend either the neighborhood traditional public school or a charter school.

## II. PUBLIC EDUCATION FOR STUDENTS WITH SPECIAL NEEDS

After the Revolutionary War, public education became a focus for U.S. leaders.<sup>39</sup> Initially, individual states worked with churches to create public schools.<sup>40</sup> In the nineteenth century, universal public education became a state goal, starting in Massachusetts.<sup>41</sup> Today, each state has a constitutional provision providing for public education.<sup>42</sup> Additionally, states and the federal government have laws requiring that students with disabilities receive services, so they can enjoy the benefits of a public education as well.<sup>43</sup> While the ideal is that every child with a disability is identified and given appropriate services to aid them in their education,<sup>44</sup> the reality is that some students are overlooked or do not receive their services. This oversight can result in negative consequences for the

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<sup>39</sup> Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2380 (2004).

<sup>40</sup> *Id.* at 2382.

<sup>41</sup> *Id.* at 2383–84.

<sup>42</sup> Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. JUSTICE, <http://www.edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> (last visited Nov. 1, 2015).

<sup>43</sup> See *infra* Parts I.A, I.B.

<sup>44</sup> 20 U.S.C. § 1412(a)(1)(A) (2012).

individual child and the community.<sup>45</sup>

*A. Legislation Mandating Education Services for Students with Disabilities*

Though states established public schools, the federal government historically did not see itself as having a role in public education.<sup>46</sup> Beginning in the 1960s and 1970s, some states had legislation delineating the right of individuals with disabilities to receive a public education, but national uniformity in serving students with disabilities was lacking.<sup>47</sup> In 1975, Congress passed the Education for All Handicapped Children Act (EAHCA) to provide federal funds to states to ensure uniformity in the procedures for the identification of students with disabilities and the provision of substantive resources through the states.<sup>48</sup> States were required to provide a “free appropriate public education” in the “least restrictive environment” through the creation and implementation of an “individualized education program” (IEP).<sup>49</sup> Through an amendment in 1990, the title changed to Individuals with Disabilities Education Act (IDEA).<sup>50</sup>

*1. Individuals with Disabilities Education Act (IDEA)*

IDEA requires that each state identify all children throughout the state who have a disability and qualify for services.<sup>51</sup> According to the act, for a state to qualify for federal assistance, the state must identify, locate, and evaluate all

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<sup>45</sup> See *infra* Part I.D.

<sup>46</sup> CRC PUBLIC EDUCATION, *supra* note 12, at v.

<sup>47</sup> Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 484–85 (1991).

<sup>48</sup> *Id.* The EAHCA amended the Education of the Handicapped Act. *Id.* at 483 n.1.

<sup>49</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773-96 (codified as amended at 20 U.S.C. §§ 1400–1461). Huefner, *supra* note 47, at 485.

<sup>50</sup> Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. § 1400(a)); Huefner, *supra* note 47, at 485. The Individuals with Disabilities Education Act was most recently reauthorized in 2004. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

<sup>51</sup> 20 U.S.C. § 1412(a)(3)(A).

children with disabilities residing in the state, including those who are homeless, wards of the state, and attending private schools.<sup>52</sup> Furthermore, the state must make available a free appropriate public education to all children from the ages of three through twenty-one.<sup>53</sup> A child is eligible for services under IDEA if the “child (1) is diagnosed with an enumerated disability that (2) adversely affects educational performance, and (3) by reason thereof needs special education.”<sup>54</sup>

Rather than relegating all students with special needs to an isolated classroom, schools must educate students within the least restrictive environment.<sup>55</sup> Thus, children with disabilities are educated within the same classroom setting as students without disabilities and are not removed from that setting unless the services cannot be effectively provided otherwise.<sup>56</sup> The least restrictive environment requirement applies whether the student attends a public or a private school.<sup>57</sup>

Additionally, IDEA mandates that an individualized education program (IEP) must be created and followed by schools that educate students with disabilities.<sup>58</sup> According to IDEA, an IEP is a written statement that is developed for each child with a disability following the requirements listed in 20

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<sup>52</sup> The state must identify the following:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

*Id.*

<sup>53</sup> 20 U.S.C. § 1412(a)(1)(A).

<sup>54</sup> Robert A. Garda, Jr. & Senator Robert Stafford, *Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 294 (2006).

<sup>55</sup> 20 U.S.C. § 1412(a)(5)(A).

<sup>56</sup> *Id.* Least restrictive environment means,

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

*Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 20 U.S.C. § 1414(d)(2)(A) (2012) (requiring that an individual education program be in effect at the beginning of each year for each child with a disability).

U.S.C. § 1414.<sup>59</sup> This statement must be reviewed and revised periodically; it includes various enumerated elements regarding the child's present academic progress, how the child's disability affects her progress, what her annual goals are, and what services will help her attain those goals.<sup>60</sup>

Federal regulations implementing IDEA specify the members of the group that will determine if the child has a specific learning disability.<sup>61</sup> The group is comprised of the child's parents and "a team of qualified professionals," which includes the student's regular teacher and at least one person who is qualified to do diagnostic testing of the child, such as a school psychologist or speech pathologist.<sup>62</sup> In addition to participating in the determination of whether their child has a learning disability, parents are also involved in the creation of the IEP.<sup>63</sup> The IEP team must make every effort to have parents present at IEP development meetings.<sup>64</sup> Requirements include arranging the meeting at a time that the team and the parents have agreed upon, notifying the parents in advance of the meeting, arranging for a teleconference, and providing an interpreter if necessary.<sup>65</sup> This guideline demonstrates the importance of parental involvement in the IEP process.<sup>66</sup> Furthermore, IEPs must be reviewed periodically, but at least annually, to monitor whether goals are being achieved and whether revisions need to be made.<sup>67</sup>

In addition to IDEA, there are other laws designed to ensure that students with special needs are receiving an appropriate education.<sup>68</sup> Under § 504 of the Rehabilitation Act of 1973, no one may be discriminated against on the basis of

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<sup>59</sup> 20 U.S.C. § 1414(d) (explaining individual education programs).

<sup>60</sup> *Id.*

<sup>61</sup> 34 C.F.R. § 300.308 (2013) (explaining who will comprise the team that makes the determination of whether a child has a disability).

<sup>62</sup> *Id.*

<sup>63</sup> 34 C.F.R. § 300.321 (delineating the requirements for the participants of the individual education program team).

<sup>64</sup> 34 C.F.R. § 300.322 (explaining parent participation in the individual education program process).

<sup>65</sup> *Id.*

<sup>66</sup> Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1821 (2008) (explaining that society and the legal system expect parents to represent their children's interests in education, even when parents are not equipped to do this).

<sup>67</sup> 34 C.F.R. § 300.324 (2013).

<sup>68</sup> *See, e.g.*, 29 U.S.C. § 701 (2012); MICH. COMP. LAWS § 380.1751 (2012).

her disability or be denied benefits by a program that receives federal financial assistance.<sup>69</sup> Because disability is defined more broadly under § 504, a student may qualify for services under § 504 and not under IDEA, or he or she may qualify under both.<sup>70</sup> However, unlike IDEA, § 504 provides no federal funding.<sup>71</sup> Title II of the Americans with Disabilities Act extends § 504 to public schools, among other government entities, whether or not they receive any federal funds.<sup>72</sup> As a result, § 504 requires the school to make modifications to procedures and policies to avoid discrimination based on disability.<sup>73</sup>

Federal law sets out processes and requirements to ensure the inclusion and education of students with disabilities in public schools.<sup>74</sup> IDEA links federal funds to a state's compliance with the requirement for finding children with

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<sup>69</sup> 29 U.S.C. § 794(a) (2012). Section 504 requires that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .” *Id.*

<sup>70</sup> An individual with drug dependency or a physical disability not affecting a child's educational performance would be included under § 504, but not under IDEA. CRC PUBLIC EDUCATION, *supra* note 12, at 23. For §504, a disability means “a physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102 (2012). According to federal regulations implementing IDEA, a

[c]hild with a disability means a child evaluated . . . as having [intellectual disability,] a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, . . . an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. § 300.8 (2013).

<sup>71</sup> CRC PUBLIC EDUCATION, *supra* note 12, at 23.

<sup>72</sup> *Id.* at 24.

<sup>73</sup> *Id.* Section 504 allows for parents to ensure their child is receiving a free appropriate public education by having an enforcement mechanism. *See* Office for Civil Rights, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, ED.GOV (Dec. 19, 2013), <http://www2.ed.gov/about/offices/list/ocr/504faq.html>. Parents who believe their child is not receiving a free appropriate public education may file a complaint with the U.S. Department of Education Office for Civil Rights. *Id.* The Office for Civil Rights will investigate the complaints to see if the school district is in violation of § 504. *Id.* The Office for Civil Rights will first help the school to first come into voluntary compliance. *Id.* If this step is unsuccessful, the Office for Civil Rights may begin proceedings to remove Department of Education financial assistance or refer the case to the Department of Justice. *Id.*

<sup>74</sup> *See supra* text accompanying notes 51–73.

disabilities and creating IEPs for them to receive appropriate services.<sup>75</sup> While not offering more federal money, due to the assistance that the federal government gives to states for education already, § 504 requires that schools not discriminate based on a child's disability.<sup>76</sup> Though federal laws dictate requirements for special education, states have their own special education laws that supplement federal law.<sup>77</sup>

## 2. *State special education laws*

In addition to federal laws mandating services for students with special needs, state laws may require students with disabilities to receive services.<sup>78</sup> For example, the Michigan Constitution provides for special education funding because “[i]nstitutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally, or otherwise seriously disabled shall always be fostered and supported.”<sup>79</sup> In addition, the local school board is responsible for ensuring that students with disabilities receive services.<sup>80</sup> The school district will either provide the services itself or contract with another intermediate or local district to ensure that services are provided.<sup>81</sup> Additionally, under Michigan Administrative Rules for Special Education Rule 340.1721e, once a child has been evaluated and determined to need an IEP, the IEP team must develop an IEP for the child, following IDEA's requirements.<sup>82</sup> Parents must be notified to provide consent to evaluate their child for a disability, and then, parents must be notified that an IEP is being created.<sup>83</sup> The rest of the process follows the federal regulations for the creation of an IEP.<sup>84</sup>

Michigan has an additional level between the state

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<sup>75</sup> See *supra* text accompanying notes 51–67.

<sup>76</sup> See *supra* text accompanying notes 68–73.

<sup>77</sup> See *infra* Part I.A.2.

<sup>78</sup> MICH. COMP. LAWS § 380.1751 (2012) (delineating the requirements that the local school district must fulfill regarding special education services).

<sup>79</sup> MICH. CONST. art. VIII, § 8.

<sup>80</sup> MICH. COMP. LAWS § 380.1751.

<sup>81</sup> *Id.*

<sup>82</sup> MICH. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC., MICH. ADMIN. RULES FOR SPECIAL EDUC., at Part II.12 (2012), [http://www.michigan.gov/documents/mde/MARSE\\_Supplemented\\_with\\_IDEA\\_Regs\\_379598\\_7.pdf](http://www.michigan.gov/documents/mde/MARSE_Supplemented_with_IDEA_Regs_379598_7.pdf).

<sup>83</sup> *Id.* at Part II.10.

<sup>84</sup> *Id.* at Part II.12.

Department of Education and local school districts called an intermediate school district (ISD).<sup>85</sup> ISDs are groupings of local school districts<sup>86</sup> that provide services to the state and local school districts.<sup>87</sup> As of 2010, Michigan had fifty-seven ISDs, which are educational service agencies responsible for creating and implementing plans to provide special education services to students.<sup>88</sup> While local districts are also responsible for implementing the special education services, the ISDs must keep the records and coordinate the special education programs.<sup>89</sup> ISDs can levy property taxes with some restrictions, but the money is divided among its local districts.<sup>90</sup> Under IDEA, the federal government categorizes ISDs as LEAs, so ISDs are responsible for ensuring that children are receiving special education services.<sup>91</sup> Depending on how the ISD and local districts have decided to structure their special education services, the services may be provided by the ISD or the local school district.<sup>92</sup>

In Michigan, charter schools are considered LEAs and are part of an ISD.<sup>93</sup> As an LEA, charter schools have the responsibility to provide identification, diagnostic, transportation, and other program services.<sup>94</sup> However, because charter schools in Michigan are part of an ISD, the ISD ultimately oversees the special education services and ensures compliance.<sup>95</sup> While not all states have ISDs like Michigan,<sup>96</sup>

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<sup>85</sup> CRC PUBLIC EDUCATION, *supra* note 12, at vii.

<sup>86</sup> See DEP'T OF TECH., MGMT. & BUDGET, MICHIGAN SCHOOL DISTRICTS AND INTERMEDIATE SCHOOL DISTRICTS (2012), [http://www.michigan.gov/documents/CGI-state\\_sch\\_district\\_67407\\_7.pdf](http://www.michigan.gov/documents/CGI-state_sch_district_67407_7.pdf) (illustrating how the local school districts are grouped into Michigan's fifty-seven intermediate school districts).

<sup>87</sup> CRC PUBLIC EDUCATION, *supra* note 12, at vii.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 26. Not every state has intermediate school districts overseeing its local school districts, so in other states, the local school district would be the local educational agency responsible for overseeing special education services. *See id.*

<sup>92</sup> *Id.* at 25.

<sup>93</sup> *See id.* (illustrating the discretion that intermediate school districts have regarding whether the intermediate school district or the local educational agency—here being the traditional public school or public school academy—is responsible for providing various special education services).

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* at 20 (comparing and contrasting public school academies and traditional public school districts in Michigan).

<sup>96</sup> *Id.* at 26.

both state and federal law have procedural requirements that an LEA is required to follow.<sup>97</sup> In order to ensure the procedures are in place, both the federal government and states provide funding for special education.<sup>98</sup>

### *B. Funding of Special Educational Services*

To implement programs and ensure service delivery, special education funding comes from a variety of sources.<sup>99</sup> Both federal and state funds are available to the states to ensure implementation of services.<sup>100</sup> If the state reduces funding for special education services in a year, then the federal government will reduce funding as well by the same amount.<sup>101</sup> In the event that states face severe economic difficulty due to a natural disaster or unforeseen financial decline, the state may apply for a waiver regarding special education funding for that year.<sup>102</sup> However, if the state fails to meet the funding requirements for a year, due to a waiver or not, the state must still fund special education in subsequent years at the level that would have been required for that year had there not been a missed year of funding.<sup>103</sup>

As an example of how education responsibility and funding interact, in Michigan's case, the state constitution provides for public education through the establishment of a state board of education, which is semi-independent.<sup>104</sup> The legislature has the responsibility to pass statutes relating to public education.<sup>105</sup> Though the state has the ultimate control over education, the state delegates a great deal of power to local school districts.<sup>106</sup> The local school districts are then funded

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<sup>97</sup> See *supra* text accompanying notes 51–84.

<sup>98</sup> See *infra* text accompanying notes 99–122.

<sup>99</sup> CRC PUBLIC EDUCATION, *supra* note 12, at 25.

<sup>100</sup> 20 U.S.C. § 1412(a)(18) (2012).

<sup>101</sup> § 1412(a)(18)(B)

<sup>102</sup> If a state is faced with a situation like a natural disaster, leaving the state in financial distress, the state may apply for, and the Secretary of Education may grant a waiver regarding the amount of funding that the state must put forth for special education, which cannot be less than the funding allocated the year prior. *Id.* If the waiver is granted for that fiscal year, then the federal level of funding remains intact. *Id.*

<sup>103</sup> § 1412(a)(18)(D)

<sup>104</sup> CRC PUBLIC EDUCATION, *supra* note 12, at v–vi.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

primarily through the state with some local funding.<sup>107</sup>

Prior to 1994, in Michigan, school districts were primarily funded through local property taxes; however, that changed through the passage of Proposal A.<sup>108</sup> Currently, the state determines the operating budget for a district, which is limited in its ability to contribute more funds should state funding be reduced.<sup>109</sup> The foundation allowance determines the school funding which will vary by district and by the number of students within the district.<sup>110</sup> This system creates issues since the entity that determines the budget is not the local district, which actually controls the spending.<sup>111</sup>

While the state controls general education funding, special education finances are still mostly locally controlled.<sup>112</sup> Proposal A limited the property taxes that could be used for special education.<sup>113</sup> Though there are federal mandates regarding special education, federal funds to the state do not cover these requirements entirely.<sup>114</sup> The state contributions for special education operate through reimbursements of local expenditures.<sup>115</sup> The state must reimburse the district for just under twenty-nine percent of the approved special education costs and seventy percent of the approved special education transportation costs.<sup>116</sup> Additionally, when a local district does

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<sup>107</sup> *Id.*

<sup>108</sup> Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J.L. SOC'Y 111, 136 (2011). Proposal A tried to equalize some of the funding disparities for general education, but did not attempt to equalize special education funding disparities to the same extent. CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 16. Proposal A refers to a ballot proposal which voters approved in 1994. *Id.* at 11. The previous December, the legislature voted to restructure the educational funding system. *Id.* Proposal A, which was approved, based much of educational funding on an increase in the state sales tax. *Id.* If Proposal A failed, the legislature had an alternative statutory provision that would take effect based on an income tax increase and a business tax. *Id.* The 1963 Constitution had set a limit on the sales tax rate allowed, so voter approval was needed to go forward with the plan. *Id.*

<sup>109</sup> Hammer, *supra* note 108, at 137; CRC PUBLIC EDUCATION, *supra* note 12, at 16.

<sup>110</sup> Hammer, *supra* note 108, at 127. The foundation allowance is a per pupil allotment of funds created from state aid and revenue from local property taxes. CRC PUBLIC EDUCATION, *supra* note 12, at 15.

<sup>111</sup> Hammer, *supra* note 108, at 126.

<sup>112</sup> CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 12.

<sup>113</sup> *Id.* at 11.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 23–24.

<sup>116</sup> *Id.* at 25.

not have the funds to cover all of the special education expenses, the district relies on what is left of the general education fund, causing a funding strain.<sup>117</sup> Moreover, beyond the state's contributions, local district voters can pass a millage increase to supplement special education funding, meaning funding per special education student varies widely from district to district.<sup>118</sup>

In 2007, Michigan received \$1.54 billion in federal funds for education.<sup>119</sup> Additionally, the state sources contributed \$11.38 billion and local sources contributed \$6.73 billion towards education.<sup>120</sup> In 2010, transportation costs for general education students on average were \$718 compared to \$6,393 on average for students receiving special education services.<sup>121</sup> To compare the budgets after the districts became all-charter school districts, for fiscal year 2016, Muskegon Heights Public School Academy and Highland Park Public School Academy each received a general per pupil foundation allowance of \$7,391 compared to the special education funding per pupil of \$14,397 in fiscal year 2010.<sup>122</sup> These numbers demonstrate the extent to which providing services for special education is more expensive than general education.<sup>123</sup>

Though funding for special education comes from the federal government, states, and local districts, the amount of federal funding is dependent on the state's contributions.<sup>124</sup> The data from Michigan show that special education is a great deal more expensive to fund compared to general education—for instance, it was almost nine times as much for transportation costs in 2010.<sup>125</sup> While federal and state laws have mandated funding for the various procedures required in giving a free

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<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* at 12. For example, in fiscal year 2010, the lowest spending intermediate school district, Delta-Schoolcraft Intermediate School District, spent about \$9,000 per pupil, and Washtenaw Intermediate School District spent the highest in the state, around \$19,000 per pupil. *Id.* at 17. Special education funding also comes from federal, state, and local sources, which have different rules attached to the use of the money depending on the source. *Id.* at 12.

<sup>119</sup> CRC PUBLIC EDUCATION, *supra* note 12, at v.

<sup>120</sup> *Id.*

<sup>121</sup> CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 21.

<sup>122</sup> *See supra* note 26.

<sup>123</sup> *See supra* notes 121–122 and accompanying text.

<sup>124</sup> *See supra* notes 99–103 and accompanying text.

<sup>125</sup> *See supra* notes 121–122 and accompanying text.

appropriate public education to a child, case law has helped define the outer boundaries of the federal procedural requirements for special education.<sup>126</sup>

### C. Case Law Interpreting IDEA

The requirements for providing special education services are contingent upon state law, federal law, federal regulations, and cases interpreting that law.<sup>127</sup> Since 1975, federal law has dictated that a child must receive a free appropriate public education; however, the meaning of the phrase remained in question.<sup>128</sup> In *Board of Education v. Rowley*, the Supreme Court noted that a free appropriate public education “consists of educational instruction specially designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.”<sup>129</sup> The instruction and support services are publicly funded and supervised, and must follow the child’s IEP.<sup>130</sup> From the Court’s perspective, Congress, through IDEA, intended to give all students access to education through a specific process, which must be followed in order to comply with the law.<sup>131</sup> Courts have found that not complying with procedural aspects of IDEA results in a denial of a free appropriate public education.<sup>132</sup>

More recently, in *Cedar Rapids Community School District v. Garret F. ex rel. Charlene F.*, the school district argued that the “related services” requirement from IDEA did not include a full-time school nurse to assist with the respondent,<sup>133</sup> a child paralyzed from the neck down who required a ventilator to

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<sup>126</sup> See *infra* notes 129–143 and accompanying text.

<sup>127</sup> See, e.g., 20 U.S.C. § 1412 (2006); 34 C.F.R. § 300.28 (2013); MICH. ADMIN. RULES FOR SPECIAL EDUC., *supra* note 82.

<sup>128</sup> See *supra* note 49 and accompanying text.

<sup>129</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188–89, 210 (1982) (holding that a school district is not required to provide a sign-language interpreter for a hearing-impaired child whose educational needs were being met by the school district through other services).

<sup>130</sup> *Id.* at 189.

<sup>131</sup> Garda, *supra* note 28, at 675.

<sup>132</sup> *Id.*

<sup>133</sup> *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73, 79 (1999) (affirming lower court’s finding that school district must pay for nurse at school for child who was paralyzed from waist down and finding that a cost-only consideration of services is not supported by IDEA).

attend school.<sup>134</sup> One of the district's reasons for not providing for a full-time nurse was because of the cost related to the student's necessary services within the school setting.<sup>135</sup> The Court addressed the relationship that cost can play in the determination of services provided through IDEA.<sup>136</sup> While cost may be a concern of the district, cost is not used to define the "related services" or "medical services" which may or may not be provided.<sup>137</sup> As a result, using that district's cost-based standard as the only way to determine whether a service is covered would result in the Court rewriting the law and conflict with the purpose of IDEA.<sup>138</sup> Therefore, cost cannot be the defining factor in determining which "related services" are included in a child's IEP under IDEA.<sup>139</sup>

Court cases have helped to set the perimeter of what compliance with federal law actually entails.<sup>140</sup> Following the procedures set forth in IDEA will result in compliance,<sup>141</sup> however, cost cannot be the determining factor for which resources are necessary.<sup>142</sup> Though IDEA gives criteria for identifying students who qualify for special education services, courts and LEAs have had difficulty determining how to interpret the law, resulting in both under- and over-identification.<sup>143</sup>

#### *D. Students with Disabilities and the Justice System*

Children are entitled to a free appropriate public education,

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<sup>134</sup> *Id.* at 69.

<sup>135</sup> *Id.* at 76–77.

<sup>136</sup> *Id.* at 77.

<sup>137</sup> *Id.* The Court explained that

[t]he District may have legitimate financial concerns, but our role in this dispute is to interpret existing law. Defining "related services" in a manner that accommodates the cost concerns Congress may have had . . . is altogether different from using cost itself as the definition. Given that § 1401(a)(17) does not employ cost in its definition of "related services" or excluded "medical services," accepting the District's cost-based standard as the sole test for determining the scope of the provision would require us to engage in judicial lawmaking without any guidance from Congress. It would also create some tension with the purposes of the IDEA.

*Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See supra* text accompanying notes 129–139.

<sup>141</sup> *See* Garda, *supra* note 28, at 675.

<sup>142</sup> *See supra* text accompanying note 137.

<sup>143</sup> Garda & Stafford, *supra* note 54, at 296 nn.18–19.

so a denial of that could have serious ramifications for the child and society as a whole.<sup>144</sup> In the juvenile justice system, individuals with disabilities are disproportionately represented.<sup>145</sup> There is speculation as to just how many youth in the criminal justice system have learning disabilities.<sup>146</sup> The rate of youth with disabilities within the criminal justice system may be four or five times more than the general population of youth in public schools.<sup>147</sup> The result is that between thirty and fifty percent of youth in the criminal justice system have some sort of special education disability.<sup>148</sup> This is not to say that all children who have disabilities will have legal issues, but many youth who are in the justice system do have special education disabilities.<sup>149</sup>

For children with special education needs in the justice system, they often enter through a status offense such as truancy.<sup>150</sup> A common trend for children with disabilities in the justice system is that their disabilities were not identified, so they did not receive services.<sup>151</sup> As a result, the students continued to perform poorly in school.<sup>152</sup> This caused the child to repeat grades, eventually leading to behavioral problems and truancy in middle school.<sup>153</sup> Students with unidentified disabilities are more likely to demonstrate poor behaviors in school and at home, leading to other status offenses such as ungovernability.<sup>154</sup> Identifying students with disabilities and providing them with special education services may prevent

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<sup>144</sup> Huefner, *supra* note 47, at 485.

<sup>145</sup> ROBERT B. RUTHERFORD ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONS SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 7 (2002).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (citing L. M. Bullock & P. McArthur, *Correctional Special Education: Disability Prevalence Estimates and Teacher Preparation Programs*, EDUC. & TREATMENT OF CHILDREN, 17, 347–55 (1994).

<sup>148</sup> *Id.* at 7.

<sup>149</sup> *See id.*

<sup>150</sup> Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876 (2009). A status offense is a behavior that is criminal for youth because of their age such as truancy or running away. *Id.* at 876 & n.3. This is distinguished from a delinquency charge, which occurs when a youth commits and act that would be criminal for an adult as well, such as assault. *Id.*

<sup>151</sup> Tulman, *supra* note 31.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Tulman & Weck, *supra* note 150, at 876, 882–83.

these students from ever encountering the juvenile justice system.<sup>155</sup> Therefore, whether students attend public or charter schools, compliance with laws relating to special education is vital.

### III. CHARTER SCHOOLS AND THEIR EFFECTIVENESS IN PROVIDING SPECIAL EDUCATION SERVICES

In the late 1980s, the idea of reforming the public education system through choice in public schools gained momentum.<sup>156</sup> Both Democrats and Republicans supported “choice” in education without an agreement as to what it actually meant.<sup>157</sup> Charter schools were a manifestation of choice in public education and created in hopes of bringing more accountability into public education.<sup>158</sup>

According to the U.S. Department of Education, charter schools are public schools created through a sponsor, which is the local or state school board in most cases.<sup>159</sup> In return for increased autonomy,<sup>160</sup> charter schools are accountable to their sponsor and must adhere to the charter.<sup>161</sup> The charter is a “performance contract” that delineates the goals, assessment methods, and measures of success.<sup>162</sup> If a charter school fails to

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<sup>155</sup> *Id.* at 878.

<sup>156</sup> JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, & AMERICA'S SCHOOLS* 206 (1990).

<sup>157</sup> *Id.* at 206–07. Minnesota, Cambridge, Massachusetts, and Manhattan's District No. 4 in New York City all experimented with choice in a variety of ways, including removing district lines and neighborhood schools and creating schools focused on specific subjects or themes. *Id.* at 210–15.

<sup>158</sup> Garda, *supra* note 28, at 662–63 (arguing that federal and state regulations and charter schools will need to change some to make charter schools more effective for students in special education).

<sup>159</sup> According to the U.S. Department of Education, “[c]harter schools are nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools.” U.S. Dep’t of Educ., *Answers: Charter Schools*, ED.GOV, <https://answers.ed.gov/ics/support/KBAnswer.asp?questionID=603&hitOffset=140+131+115+105+86+80+57+31+7+5+1&docID=54> (last visited Nov. 20, 2015).

<sup>160</sup> Charter school legislation as of 1996 exempted charter schools from regulations regarding curriculum, class sizes, and teacher qualifications among other requirements. Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV., 301, 307 n.25 (1997).

<sup>161</sup> U.S. Dep’t of Educ., *supra* note 159.

<sup>162</sup> *Id.* According to a 2007 survey of charter school authorizers, the vast majority of authorizers were Local Education Agencies (LEAs) at 85.7% of the survey

demonstrate academic success by meeting the goals set, then the charter may be revoked or not renewed, and the school is closed.<sup>163</sup>

Among charter schools' guiding principles of choice and accountability is also "autonomy."<sup>164</sup> Though charter schools may specialize,<sup>165</sup> they are still public schools and, as such, must provide a free appropriate public education for all students.<sup>166</sup> Proponents of charter schools believed that by removing many of the constraints faced by traditional public schools, charter schools could experiment with curriculum and other areas to make needed improvements in education.<sup>167</sup> In 1991, Minnesota became the first state to pass legislation authorizing charter schools.<sup>168</sup> While the charter school movement gained momentum in the U.S., other hybrid education models, which mix public and private education, were instituted in countries around the world.<sup>169</sup> During the

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respondents. LAUREN MORANDO RHIM ET AL., PROJECT INTERSECT: STUDYING SPECIAL EDUCATION IN CHARTER SCHOOLS: RESEARCH REPORT # 6: SURVEY OF CHARTER SCHOOL AUTHORIZERS 9 (2007), [http://www.sde.idaho.gov/site/charter\\_schools/authorizers\\_docs/Project%20Intersect%20Studying%20Special%20Education%20in%20Charter%20Schools.pdf](http://www.sde.idaho.gov/site/charter_schools/authorizers_docs/Project%20Intersect%20Studying%20Special%20Education%20in%20Charter%20Schools.pdf). However, non-LEAs were more active authorizers, so more non-LEAs have authorized charter schools. *Id.* at 12. The authors argue that authorizers of charter school districts should either provide special education services or ensure that the charter school is capable of doing such. *Id.* at 30.

<sup>163</sup> Garda, *supra* note 28, at 666.

<sup>164</sup> *Id.* at 662–63.

<sup>165</sup> *Id.* at 667–68. Charter schools may focus on a specific curriculum or approach to learning, which may not appeal to all children and parents. Lauren Morando Rhim & Margaret McLaughlin, *Students with Disabilities in Charter Schools: What We Now Know*, FOCUS ON EXCEPTIONAL CHILDREN, Jan. 2007, at 1, 5. See, e.g., *Explore School Models*, YOUR CHILD. YOUR CHOICE, <http://choicesineducation.com/find-a-school/explore-school-models> (last visited Nov. 20, 2015) (identifying a variety of learning approaches in charter schools including blended learning, arts integration, and math and science focused approaches). Authorizers have reported special education as a reason for revoking charters. RHIM ET AL., *supra* note 162, at 21.

<sup>166</sup> See *supra* note 49 and accompanying text.

<sup>167</sup> Garda, *supra* note 28, at 662–63.

<sup>168</sup> Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 757 (2000) (arguing that deregulation in education and Equal Protection Clause analysis are in conflict, resulting in the need for utilizing different vocabulary in drafting legislation for charter schools and the need for federal courts to approach equal protection analysis differently).

<sup>169</sup> See STEPHEN J. BALL & DEBORAH YUDELLE, HIDDEN PRIVATISATION IN PUBLIC EDUCATION 18 (2007), <http://download.ei-ie.org/docs/IRISDocuments/Research%20Website%20Documents/2009-00034-01-E.pdf>. For example, Spain and Chile have schools that are private, public, and private with state funding and subsidization. *Id.* at 20. In New Zealand, schools can contract with a private company to provide education to individuals who no longer want to attend the school district. *Id.*

2012–2013 school year, forty-two states in the U.S. allowed charter schools.<sup>170</sup> About 6,000 charter schools were educating 2.3 million students in the U.S. during that time.<sup>171</sup>

A. *Charter Schools Educating Students Who Qualify for Special Education Services*

Though charter schools enjoy both bipartisan and vast parental support, their record of effectively educating all students, especially those with special needs, is questionable.<sup>172</sup> There are between fifty and sixty charter schools throughout the country that specifically recruit students with disabilities because this is the focus of their school, but these are the exception.<sup>173</sup> Nationally, thirteen percent of students in U.S. public schools are special education students; however, within charter schools, special education students make up only eight to ten percent of the population.<sup>174</sup> New Orleans, with the highest percentage of students in charter schools, and Los Angeles, with the largest number of charter schools, illustrate the national trend that charter schools enroll a smaller percentage of special education students.<sup>175</sup>

New Orleans and Michigan demonstrate the disproportionality of enrollment. In post-Katrina New Orleans, the school district was restructured to provide for more choice and no boundary lines.<sup>176</sup> The Recovery School District, created post-Katrina, runs some public schools and oversees most charter schools.<sup>177</sup> Additionally, the Orleans Parish School Board operates both public and charter schools.<sup>178</sup> Charter schools there reported special education students comprised 7.8% of their student population compared to 12.6% in

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at 28.

<sup>170</sup> CREDO NATIONAL, *supra* note 18, at 1.

<sup>171</sup> *Id.*

<sup>172</sup> See Garda, *supra* note 28, at 658–59.

<sup>173</sup> Gary Miron, *Charters Should Be Expected to Serve All Kinds of Students*, EDUCATIONNEXT, <http://educationnext.org/charters-expected-serve-kinds-students/> (last visited Nov. 20, 2015).

<sup>174</sup> *Id.*; CREDO NATIONAL, *supra* note 18, at 16.

<sup>175</sup> Garda, *supra* note 28, at 683–84.

<sup>176</sup> Mark C. Weber, Comment, *Special Education From the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System*, 11 LOY. J. PUB. INT. L. 217, 218 (2010).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

traditional public schools.<sup>179</sup> In Michigan, students in special education make up nine percent of the student population in charter schools compared to eleven percent in traditional public schools.<sup>180</sup>

In addition to underrepresentation of children with disabilities, some charter schools have not complied with IDEA mandates. Researchers in a 2000 national study funded by the Department of Education found that one-fourth of the charter schools included in the study actively counseled out parents whose children had disabilities.<sup>181</sup> Sometimes parents who placed children in the charter schools would not inform the school that their child had an IEP at their former school.<sup>182</sup> Furthermore, some charter schools were not identifying children with disabilities.<sup>183</sup> In New Orleans, some charter schools have not been compliant with IDEA requirements.<sup>184</sup> One of the twenty-three charter schools that participated in a study of New Orleans charter schools provided no special education services, even though students had IEPs requiring services.<sup>185</sup> Moreover, the Recovery School District in New Orleans is responsible for evaluating students for special education services; however, schools have complained because of the long waiting period for the evaluations.<sup>186</sup> While choice in education was constrained in New Orleans, parents could still choose between the public and charter schools.<sup>187</sup>

Only recently has the federal government shifted from

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<sup>179</sup> Garda, *supra* note 28, at 683–84.

<sup>180</sup> CREDO MICHIGAN, *supra* note 17, at 11.

<sup>181</sup> THOMAS A. FIORE ET AL., CHARTER SCHOOLS AND STUDENTS WITH DISABILITIES: A NATIONAL STUDY 20 (2000). While the information garnered from the study cannot be used to categorize all charter schools, the results are still concerning. *Id.* Though at over half the charter schools visited, parents said that their child with a disability was either encouraged to enroll or the disability was not part of the admission process. The study did not interview parents who chose not to enroll their child at the charter schools. *Id.* at 21. As a result, the number of parents who have been counseled out is unknown. *Id.*

<sup>182</sup> *Id.* at 22.

<sup>183</sup> *Id.*

<sup>184</sup> Weber, *supra* note 176, at 228.

<sup>185</sup> *Id.* at 229. A study done by Project Special Education on the Recovery School District found questionable practices regarding providing special education services, including keeping students on rosters to continue receiving money for the child, but only providing the minimal services that the school was already equipped to provide. *Id.* at 219 n.10.

<sup>186</sup> *Id.* at 229.

<sup>187</sup> *Id.* at 218.

looking at compliance regarding special education legislation as a procedural issue towards looking at compliance relating to outcomes in special education as well.<sup>188</sup> Additionally, researchers have difficulty collecting data on student achievement for those in special education due to the small numbers of students.<sup>189</sup> Under No Child Left Behind, students in special education must take the standardized tests.<sup>190</sup> However, each state decides the subgroup size—including students with disabilities—that is required in order for the testing results to be made public.<sup>191</sup> If too few students are in the subgroup, then the results will not be public. Therefore, if a charter school does not identify children as special education students or has a subgroup of students that is too small, the data will be unavailable. As a result, very little reliable data is currently available to demonstrate whether charter schools actually educate students with disabilities better or worse than traditional public schools.<sup>192</sup> In Michigan, students with disabilities in charter schools made smaller gains in reading and math compared to their peers in traditional public

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<sup>188</sup> See *supra* notes 27–28.

<sup>189</sup> CREDO, CHARTER SCHOOL PERFORMANCE IN ILLINOIS 25 (2013), <http://credo.stanford.edu/documents/IL2013FinalReport.pdf> [hereinafter CREDO ILLINOIS].

<sup>190</sup> 20 U.S.C. § 6311(b)(3)(C)(ix) (2012).

<sup>191</sup> 20 U.S.C. § 6311(b)(3)(C)(xiii). The purpose of determining the subgroup size is to ensure that the numbers are statistically reliable and that they do not reveal personally identifiable information about a child. *Id.* If the group has three students in it, the students would not have anonymity in the results. See *id.*; see also Lauren Morando Rhim et al., *Charter School Statutes and Special Education: Policy Answers or Policy Ambiguity?*, 41 J. SPECIAL EDUC. 50, 60 (2007).

<sup>192</sup> CREDO studies show varied results for charter school success with students in special education. See *id.*; CREDO MICHIGAN, *supra* note 17, at 27. In the national study from 2009, gains were similar in charter schools and traditional public schools for students in special education. CREDO, NATIONAL CHARTER SCHOOL STUDY 40 (2013), <https://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>. However, in 2013, for continuing charter schools, nationally students in charter schools gained the equivalent of fourteen school days. *Id.* Looking at specific states, in Louisiana students in special education have done better in charter schools. CREDO, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 31 (2013), [http://credo.stanford.edu/documents/la\\_report\\_2013\\_7\\_26\\_2013\\_final.pdf](http://credo.stanford.edu/documents/la_report_2013_7_26_2013_final.pdf). In Los Angeles, students in special education and traditional public schools showed similar growth, though the researchers doubt the accuracy of the information due to the small number of children enrolled in special education. CREDO, CHARTER SCHOOL PERFORMANCE IN LOS ANGELES 31 (2014), [https://credo.stanford.edu/pdfs/Los\\_Angeles\\_report\\_2014\\_FINAL\\_001.pdf](https://credo.stanford.edu/pdfs/Los_Angeles_report_2014_FINAL_001.pdf). Special Education students in Illinois had similar learning gains whether in a charter school or traditional public schools. CREDO ILLINOIS, *supra* note 189, at 26.

schools.<sup>193</sup> However, state and federal laws are still based on procedure—compliance is judged by whether students with special education needs are being identified, tested, given an IEP, and reevaluated annually.<sup>194</sup> Therefore, since charter schools are public schools, they should follow the same procedures and give all students, even those with special education needs, the opportunity to attend their charter school.<sup>195</sup> Thus, the difference in special education enrollment is concerning.<sup>196</sup>

Charter schools are legally responsible for providing a free appropriate public education to students with disabilities, but sometimes fall short of their responsibilities.<sup>197</sup> According to IDEA, the LEA must serve children with disabilities in charter schools the same way that the LEA assists children in other public schools, providing both services and funding.<sup>198</sup> Charter schools, like traditional public schools, must provide

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<sup>193</sup> CREDO MICHIGAN, *supra* note 17, at 27.

<sup>194</sup> See *supra* note 28 and accompanying text.

<sup>195</sup> See Miron, *supra* note 173 (explaining that charter schools currently educate a lower proportion of students with disabilities for a variety of reasons but should seek to educate, rather than counsel out, more students with disabilities). Some critics of charter schools push for quotas of students with disabilities that a school will have to meet. Robin J. Lake, *The Key Is Innovation, Not Regulation*, EDUCATIONNEXT, <http://educationnext.org/key-innovation-regulation/> (last visited Nov. 20, 2015). This idea is not advisable since schools will feel pressure to identify students as having disabilities just to meet the quota; this could possibly lead to inaccurate identification, rather than actual conscientious identification of students in real need. *Id.* However, identifying students who have disabilities and openly offering services at the charter school is very important, especially in cities with large numbers of students attending charter schools like Detroit where forty percent of students are in charter schools. *Id.* If charter schools are not offering students with disabilities the same opportunities that a traditional public school does, then the traditional public school will be educating a disproportionate number of children with disabilities, resulting in added expense for the traditional public school. *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> 20 U.S.C. § 1413(a)(5) (2012); “[C]harter schools are subject to all federal and state civil rights laws.” Rhim & McLaughlin, *supra* note 165, at 1, 3.

<sup>198</sup> According to IDEA,

with respect to charter schools that are public schools of the local educational agency, the local educational agency-(A) serves children with disabilities attending those charter schools in the same manner as the local educational agency serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the local educational agency has a policy or practice of providing such services on the site to its other public schools; and (B) provides funds under this subchapter to those charter schools-(i) on the same basis as the local educational agency provides funds to the local educational agency’s other public schools, including proportional distribution based on relative enrollment of children with disabilities.

§ 1413(a)(5).

transportation for students with special education services, if necessary.<sup>199</sup> While some charter schools do not offer any transportation to students at all, others provide transportation to only those students with significant disabilities; this leaves some children with disabilities who need transportation no specialized transportation at all.<sup>200</sup> However, unlike traditional public schools, if the state's charter-school-enabling legislation does not require that teachers in charter schools be certified, then IDEA does not require special education teachers to be certified either.<sup>201</sup> Additionally, federal regulations and charter schools may be in tension, since educating a child with special needs can force a charter school to change its curriculum or identity in order to satisfy the requirements of a child's IEP.<sup>202</sup> For example, charter schools that base their curriculum on independent, student-driven, ungraded learning may be challenged by a child with legal requirements that necessitate more structure.<sup>203</sup> Based on a GAO study of thirteen charter schools throughout the United States, many of the schools provided special education services, but found funding was a large hurdle for providing services to children with more severe disabilities.<sup>204</sup>

Though charter schools should offer an opportunity for all children to attend and receive an appropriate education, charter schools do not educate the same proportion of children with disabilities as traditional public schools for a variety of reasons.<sup>205</sup> In order to comply with special education requirements, charter schools may have to change some of their core values to provide accommodations for students with disabilities.<sup>206</sup> At the very least, special education regulations constrain the autonomy that charter schools strive for in order

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<sup>199</sup> CRC PUBLIC EDUCATION, *supra* note 12, at 21.

<sup>200</sup> FIORE, *supra* note 181, at 43.

<sup>201</sup> Rhim & McLaughlin, *supra* note 165, at 3 (citing E. AHEARN ET AL., PRIMER FOR CHARTER SCHOOL AUTHORIZERS: SPECIAL EDUCATION REQUIREMENTS AND INCLUDING STUDENTS WITH DISABILITIES IN CHARTER SCHOOLS (2004), [http://www.charterschoolcenter.org/sites/default/files/files/field\\_publication\\_attachment/authorizer\\_primer\\_0.pdf](http://www.charterschoolcenter.org/sites/default/files/files/field_publication_attachment/authorizer_primer_0.pdf)).

<sup>202</sup> *Id.* at 5 (citing E. AHEARN ET AL., PROJECT SEARCH: SPECIAL EDUCATION AS REQUIREMENTS IN CHARTER SCHOOLS: FINAL REPORT OF A RESEARCH STUDY (2001), <http://www.gpo.gov/fdsys/pkg/ERIC-ED464427/pdf/ERIC-ED464427.pdf>).

<sup>203</sup> *Id.*

<sup>204</sup> GAO Charter Schools, *supra* note 18, at 17.

<sup>205</sup> See *supra* text accompanying notes 172–180.

<sup>206</sup> See *supra* text accompanying notes 197–203.

to innovate in education, giving them a motive for noncompliance.<sup>207</sup>

*B. Michigan: The Transition from Charter Schools to Charter Districts*

In 1993, Michigan passed legislation authorizing the creation of charter schools, referred to as public school academies.<sup>208</sup> The chartering body for a charter school in Michigan can be the governing board of public colleges or universities, the state board of education, or local or intermediate school districts.<sup>209</sup> Though supporters of charter schools in Michigan originally viewed them as a way to make essential changes to schools quickly without bureaucratic drag, the initial supporters are now looking at ways to ensure that charter schools are performing better.<sup>210</sup>

In 2012, governor-appointed emergency managers in Muskegon Heights and Highland Park created school districts entirely composed of charter schools.<sup>211</sup> This experiment in school district administration, which appears to be the first of its kind in the country, has had mixed results.<sup>212</sup> Mosaica<sup>213</sup>

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<sup>207</sup> See *supra* text accompanying notes 159–167.

<sup>208</sup> MICH. DEP'T OF EDUC., AUTHORIZER PRIMER: SPECIAL EDUC. IN PUBLIC SCH. ACADEMIES (PSA) at 7 (Sept. 2013), [http://www.charterschoolcenter.org/sites/default/files/files/field\\_publication\\_attachment/MI%20-%20AuthorizerPrimer%20Revised%20\\_9\\_16\\_13\\_0.pdf](http://www.charterschoolcenter.org/sites/default/files/files/field_publication_attachment/MI%20-%20AuthorizerPrimer%20Revised%20_9_16_13_0.pdf); David Arsen & Yongmei Ni, *The Effects of Charter School Competition on School District Resource Allocation*, 48 EDUC. ADMIN. Q. 3, 8 (2012); MICH. COMP. LAWS § 380.502 (2014).

<sup>209</sup> Arsen & Ni, *supra* note 208, at 8.

<sup>210</sup> Resmovits, *supra* note 16.

<sup>211</sup> Arsen & Mason, *supra* note 10, at 266. As of October 14, 2013, the Emergency Manager in Muskegon Heights and Highland Park left to take over as Pontiac Board of Education's district's consultant in Pontiac, Michigan, through an agreement with the state preventing the school district from having an emergency manager appointed. Dustin Blitchok, *Pontiac School Board Appoints Consultant Don Weatherspoon*, OAKLAND PRESS (Oct. 14, 2013), <http://www.theoaklandpress.com/general-news/20131014/pontiac-school-board-appoints-consultant-don-weatherspoon>. Though a district consultant does not have as much unilateral power as an emergency manager, he has power over contracts, appropriations, and collective bargaining, among other areas. *Id.* The two main focuses for the district consultant will be finances and educational achievement. *Id.*

<sup>212</sup> Ash, *supra* note 10, at 12; see *supra* note 11.

<sup>213</sup> Mosaica Education is a for-profit Education Management Organization that the board of trustees of charter school districts can contract with to run the charter schools. *About Mosaica: FAQs*, MOSAICA, <http://mosaicaeducation.com/about-mosaica/faqs> (last visited Nov. 20, 2015).

initially ran Muskegon Heights,<sup>214</sup> and Leona Group runs Highland Park.<sup>215</sup> Mosaica spent \$5.5 million of its money to get the school up and running, expecting to receive the per pupil grant from the state and a profit of \$7,000 in the first year.<sup>216</sup> The budget for 2012–2013 was \$14.6 million as a charter district compared to \$20 million for the public school district for the 2011–2012 school year.<sup>217</sup> Highland Park had been receiving \$8,195 compared to the \$7,110 per pupil that charter schools in Michigan received.<sup>218</sup> The new charter district's budget was \$8.9 million in 2012–2013, instead of the \$15.9 million budget from the previous year.<sup>219</sup> This budget was achieved by having fewer administrators and much lower salaries for teachers.<sup>220</sup> The Leona Group receives \$780,000 annually as its fee for running the school district.<sup>221</sup>

While the districts' budgets decreased and the management companies still expected a profit during their first year,<sup>222</sup> the lower operating budget potentially causes funding issues for special education.<sup>223</sup> In Michigan, if a district still has outstanding special education costs after using all of the funds dedicated to special education, then the district must use general education funds to make up the difference.<sup>224</sup> As a result, if an all-charter school district operates on a smaller budget with the management company making a profit, there

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<sup>214</sup> In April 2014, the Muskegon Heights charter school board voted to amend the contract with Mosaica, reducing the contract from five years to only two. Lynn Moore, *Mosaica Out as Manager of Muskegon Heights Charter Schools; New Firm Being Sought*, MLIVE (Apr. 28, 2014), [http://www.mlive.com/news/muskegon/index.ssf/2014/04/mosaica\\_out\\_as\\_manager\\_of\\_musk.html](http://www.mlive.com/news/muskegon/index.ssf/2014/04/mosaica_out_as_manager_of_musk.html). Mosaica achieved the overall educational outcomes, which Muskegon Heights hoped for, but the management company was not able to realize its financial goals, continuing to run on a \$600,000 deficit. *Id.*

<sup>215</sup> Arsen & Mason, *supra* note 10, at 266. Leona Group is a management organization for charter schools. *Partner with Us*, LEONA GRP., L.L.C., <http://www.leonagroup.com/partner-with-us.html> (last visited Nov. 20, 2015).

<sup>216</sup> *Mosaica 'Buys' Muskegon Heights Schools*, MEA.ORG (July 7, 2012) (on file with the author).

<sup>217</sup> Ash, *supra* note 10, at 13. A decrease in teachers' salaries contributes to the lower budget, resulting in less competitive pay compared to neighboring districts. *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* notes 216–221 and accompanying text.

<sup>223</sup> See *supra* note 117 and accompanying text.

<sup>224</sup> CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 11.

will be less money in the general education fund to cover any leftover special education expenses.

Michigan has had charter schools since 1993.<sup>225</sup> As of 2012, Michigan has also had all-charter school districts.<sup>226</sup> The switch to all-charter districts in Muskegon Heights and Highland Park, motivated by financial concerns, may have negatively impacted special education services.<sup>227</sup>

*C. Michigan's Public School Academies: Successfully Educating Students with Special Needs?*

Charter schools are prevalent in Michigan and initially had a great deal of support from stakeholders in education,<sup>228</sup> however, some charter schools may not merit that support. In Michigan's charter and traditional public schools, improvement in reading and math were lower for students receiving special education services compared to students who were not receiving those services, but gains were even smaller for the students in charter schools.<sup>229</sup> Within Detroit, the advances for students in special education within charter schools were also significantly less than the gains in traditional public schools.<sup>230</sup>

Throughout Michigan, charter schools tend to have a smaller population of students with special needs.<sup>231</sup> However, there has been some growth in the enrollment in charter schools since their inception.<sup>232</sup> From 2000–2010, the percentage of students with IEPs in charter schools tripled, most likely due to the large increase in the number of charter schools in Michigan.<sup>233</sup> While the reason for the lower population of special-needs students within charter schools is unknown,<sup>234</sup> one possibility is that parents keep their children

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<sup>225</sup> See *supra* note 208.

<sup>226</sup> Arsen & Mason, *supra* note 10, at 266.

<sup>227</sup> See *supra* note 224 and accompanying text.

<sup>228</sup> Resmovits, *supra* note 16.

<sup>229</sup> CREDO MICHIGAN, *supra* note 17, at 27.

<sup>230</sup> *Id.* at 41.

<sup>231</sup> *Id.* at 27.

<sup>232</sup> See CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 8.

<sup>233</sup> *Id.*

<sup>234</sup> GAO CHARTER SCHOOLS, *supra* note 18, at 11–14. Among the possible reasons that a lower proportion of students with disabilities are enrolled in charter schools include the following: the charter school not identifying students with needs and informal interventions, the LEA deciding that the charter school is not the best placement for a child with a disability, the charter school LEAs not having special

in traditional public schools because they believe traditional public schools are better able to provide services for their children.<sup>235</sup> If parents choose not to enroll their children in charter schools out of fear it will not provide the necessary services, the situation becomes problematic.<sup>236</sup> The charter school violates federal law when services are not provided because “students with disabilities must be provided a range of choices in programs and activities that is comparable to that offered to students without disabilities.”<sup>237</sup>

Charter schools may be using different criteria to determine whether to assess and how to identify students who need special education services, resulting in fewer students designated for special education in charter schools.<sup>238</sup> To qualify for services under IDEA, a student must have a disability that “adversely affects a child’s educational performance,”<sup>239</sup> which could be purely academic or include a student with behavior and emotional issues who “needs special education. . . services.”<sup>240</sup> IDEA does not give guidance about that terminology; instead, the state determines the meaning.<sup>241</sup> Therefore, the criteria that traditional public schools and charter schools are using to identify students with disabilities within that state should not be different. As a result, since charter schools should be providing special education services and using the same criteria to determining eligibility as traditional public schools, the ratio of special education students within charter schools should be comparable to those within traditional public schools.<sup>242</sup>

With entire districts run as charter schools, parental choice

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education resources due to funding, fewer elementary charter schools to choose from, and the charter school counseling out students with disabilities. *Id.*

<sup>235</sup> CREDO MICHIGAN, *supra* note 17, at 11.

<sup>236</sup> Garda, *supra* note 28, at 685–86.

<sup>237</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS: QUESTIONS AND ANSWERS 7, 17 (2000).

<sup>238</sup> CREDO MICHIGAN, *supra* note 17, at 27 (“[Traditional public schools] and charters may differ in their criteria for designating students as needing to be assessed for special education services.”).

<sup>239</sup> 34 C.F.R. § 300.8(c)(1), (3)–(6), (8), (9), (11)–(13) (2013). One issue in identifying students who qualify for services under IDEA is deciding what “adversely affects” and “educational performance” actually mean. *See* Garda & Stafford, *supra* note 54, at 295–306.

<sup>240</sup> 34 C.F.R. § 300.8(a).

<sup>241</sup> Garda & Stafford, *supra* note 54, at 306.

<sup>242</sup> *See id.*

and “market accountability,” two arguments supporting charter schools,<sup>243</sup> disappear. Parents are no longer able to choose between a traditional public school in their district and a charter school; they must send their child to the charter school if they want a public school in their area. Simply moving to another school is not always an option. Since transportation often is a barrier to parents moving their child to another school, parents are unable to demonstrate disapproval of the charter school by moving their child to a different school. Lack of “market accountability” becomes an even bigger issue in Michigan since there is no longer a cap on the total number of charter schools in the state.<sup>244</sup> Because of the focus on parental choice in education and specialization of charter schools, they “were never intended to address every need of all the possible students. In fact, charter schools are by their nature not designed to be all things to all students.”<sup>245</sup> Furthermore, if a student does not see a specific charter school as meeting her needs, then she does not have to attend it.<sup>246</sup> Yet, this operating assumption does not apply when an entire school district is run as a charter school, resulting in every child attending a charter school as the only public school option.<sup>247</sup>

Providing services for students with disabilities increases the operating costs for school districts.<sup>248</sup> Congress understood that these costs would be burdensome, which is why smaller LEAs would not receive funding through EAHCA, IDEA’s predecessor, unless they grouped with other LEAs to be able to provide appropriate services to students.<sup>249</sup> However, when IDEA was reauthorized, charter schools that were their own LEA were not required to group together in the same way that small LEAs were.<sup>250</sup> Therefore, while some charter schools have the option to join together, they are not required to unless the

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<sup>243</sup> See Garda, *supra* note 28, at 667.

<sup>244</sup> Resmovits, *supra* note 16.

<sup>245</sup> Garda, *supra* note 28, at 667.

<sup>246</sup> *Id.* at 669.

<sup>247</sup> Ash, *supra* note 10.

<sup>248</sup> Garda, *supra* note 28, at 688. Funding for students with disabilities can be two to three times that of funding general education students, using up to one-fourth or more of a school district’s budget for capital improvements for accessibility, staff training, and providing the services to the students. Heubert, *supra* note 160, at 312.

<sup>249</sup> Garda, *supra* note 28, at 671.

<sup>250</sup> *Id.* at 672.

state requires linking.<sup>251</sup> As a result, charter schools face the increased cost of educating children with disabilities without the requirement or the ability to share the costs with other schools and benefit from economies of scale.<sup>252</sup>

While charter schools in Michigan have become more common,<sup>253</sup> their academic gains are questionable.<sup>254</sup> Due to entire districts becoming charter school districts,<sup>255</sup> the idea of charter schools as schools of choice is a misnomer in some areas. Without having a true choice within a district, parents may be forced to place their children in a school that is not a good fit and that does not provide adequate special education services, or alternatively seek a school outside of their district.<sup>256</sup>

#### IV. WHO ENSURES THAT LOCAL SCHOOL DISTRICTS ARE IN COMPLIANCE WITH STATE AND FEDERAL LAW?

Responsibility for compliance with special education law within charter schools depends on how the state structures its charter schools. Under IDEA, the LEA is responsible for providing each child in its district with a free appropriate public education.<sup>257</sup> A state's charter-enabling statute may require that a charter school become part of an existing LEA, become an independent local district, or determine its status regarding an LEA when the charter is authorized.<sup>258</sup> When the charter school is part of an existing LEA, then the state and local school district are responsible for complying with IDEA.<sup>259</sup>

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<sup>251</sup> See 20 U.S.C. § 1413(e)(1)(B) (2012) (removing charter schools from the requirement to jointly establish their eligibility to maintain special education programs due to their size unless their state allows them).

<sup>252</sup> See Miron, *supra* note 173; Garda, *supra* note 28, at 695.

<sup>253</sup> In 1995, thirty-eight public school academies opened, and as of 2010, there were 288 open charter schools. CREDO MICHIGAN, *supra* note 17, at 10.

<sup>254</sup> See *supra* notes 247–248 and accompanying text.

<sup>255</sup> Arsen & Mason, *supra* note 10, at 266.

<sup>256</sup> See Garda, *supra* note 28, at 667–68 (explaining that charter schools are meant to give choices to parents and are able to specialize in certain academic areas like science, math, or art).

<sup>257</sup> Gleason, *supra* note 14, at 157.

<sup>258</sup> Rhim & McLaughlin, *supra* note 165, at 4. As of 2005, charter schools were independent LEAs in twelve states, part of an existing LEA in eighteen states, and determined to be part of an LEA or independent based on their authorizer or the charter school's preference in eleven states. *Id.*

<sup>259</sup> *Id.*

However, if the charter school is the LEA, then the charter school is responsible for identifying students and providing the necessary special education services, including covering the cost.<sup>260</sup> The cost is even more difficult for charter schools to cover as an LEA because they are small, have less funding, and are not able to spread out the cost.<sup>261</sup> For example, a single charter school may need to employ a sign language interpreter to fulfill a student's IEP requirements. If the LEA included more schools, then those schools could share one sign language interpreter, distributing the cost among them.<sup>262</sup>

Studies have demonstrated that whether the charter school is an independent LEA or part of an LEA impacted the special education services at the school.<sup>263</sup> Charter schools that were independent LEAs did not fully understand their relationship with districts or their responsibilities regarding reporting and other requirements.<sup>264</sup> This lack of understanding can result in charter schools not realizing that they have the responsibility of providing FAPE for students with special education needs in the same way that a school district does. Without understanding their legal responsibility, charter schools are not likely to provide special education services. While the charter schools may not have understood their legal responsibilities, charter school authorizers were aware of their responsibilities regarding educating students with disabilities, and many made special education a requirement for renewal.<sup>265</sup>

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<sup>260</sup> Gleason, *supra* note 14, at 158. Authorizers are the body legally able to contract to create the charter school. *Charter School Authorization*, MAPSA, <http://charterschools.org/olc/charter-school-authorization> (last visited Nov. 20, 2015). Depending on who authorizes the charter school, or to whom the state gives authority to create a charter school, the authorizer may see itself as more or less legally accountable for ensuring that students are receiving special education services. Rhim & McLaughlin, *supra* note 165, at 6. Though the vast majority of authorizers view themselves as legally accountable for special education, twelve percent of authorizers were not involved in providing special education services within the charter school. Rhim et al., *supra* note 162, at 26. Contrasting that, almost one third of authorizers were providing special education services within the charter school, demonstrating a great deal of involvement by the authorizer. *Id.*

<sup>261</sup> Gleason, *supra* note 14, at 158.

<sup>262</sup> See Garda, *supra* note 28, at 695.

<sup>263</sup> Rhim & McLaughlin, *supra* note 165, at 6 (citing L. M. Rhim & M. J. McLaughlin, *Special Education in American Charter Schools: State Level Policy, Practices, and Tensions*, 31 CAMBRIDGE J. EDUC. 373–83 (2001)).

<sup>264</sup> *Id.*; see also FIORE, *supra* note 181, at 21 (finding that a few charter schools were unaware that they needed to provide special education services, so they failed to do so for the first two to three years).

<sup>265</sup> RHIM ET AL., *supra* note 162, at vi–vii (finding that seventy-six percent of

One concern regarding the all-charter school districts in Michigan is that charter schools around the country have been accused of and found to be “weeding out” students with IEPs.<sup>266</sup> Charter schools will pick students with less expensive disabilities to accommodate or counsel parents out of sending their children to charter schools since the schools do not have the resources to educate their child.<sup>267</sup> Another tactic of “weeding out” students with IEPs has been to simply not identify students as having disabilities under the guise of avoiding labeling a child.<sup>268</sup> Without identifying a disability, a school cannot ensure that the child is receiving an appropriate education.<sup>269</sup> Both of the above examples are violations of federal law<sup>270</sup> and have more serious long-term consequences for the students, such as ending up in the criminal justice system.<sup>271</sup>

Muskegon Heights Public School Academy, an all-charter school district, has already been criticized for noncompliance with IDEA.<sup>272</sup> In an April 13, 2013 report, the Michigan Office

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authorizers provide oversight functions regarding special education services and sixty percent make special education a requirement for charter renewal).

<sup>266</sup> See Garda, *supra* note 28, at 686–88.

<sup>267</sup> *Id.* at 687–89. As of 2007, early concerns about charter schools not enrolling students with disabilities at the same rate as public schools had not been substantiated by research, and more research is necessary before drawing firm conclusions on this issue. Rhim & McLaughlin, *supra* note 165, at 7. Additionally, another article by Rhim and McLaughlin in March 2007 identified “counseling children with disabilities away from their schools” as a tactic used by charter schools to respond to the pressure of market accountability. McLaughlin & Rhim, *supra* note 19, at 40. A 2013 article, looking at an anonymous urban district, found no empirical evidence that low-performing students were more likely to exit a charter school than a traditional public school. Ron W. Zimmer and Cassandra M. Guarino, *Is There Empirical Evidence That Charter Schools “Push Out” Low-Performing Students?*, 35 EDUC. EVALUATION & POL’Y ANALYSIS 461, 476 (2013). However, a 2013 study of charter schools in Michigan found that students in special education represented a smaller percentage of the student body in charter schools compared to traditional public schools. See *supra* note 180 and accompanying text. Whether or not children were being counseled out, the discrepancy in the ratios is concerning. *Id.*

<sup>268</sup> Garda, *supra* note 28, at 692–93.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* Both identification of students in need of services and individualized education programs are required by IDEA in order for a state to receive financial assistance for special education. 20 U.S.C. § 1412(a)(3)–(4) (2006). As public schools, charter schools are required to offer a free appropriate public education to all students. See *supra* note 159. By convincing parents to seek other schools or picking out specific students, charter schools would not be fulfilling this legal requirement. 20 U.S.C. § 1412(a)(1)(A).

<sup>271</sup> See *supra* text accompanying notes 144–155.

<sup>272</sup> MICH. DEPT’ OF EDUC., OFFICE OF SPECIAL EDUC., FINAL REPORT FOR STATE

of Special Education found Muskegon Heights Public School Academy was noncompliant regarding one student's services.<sup>273</sup> In 2012, the school removed the student's social services, though still needed, because the school did not have a professional to provide the services.<sup>274</sup> The services were re-instituted in an amended IEP three months later.<sup>275</sup> Additionally, the findings of fact and conclusion included that the "district indicated staff members were told not to include related services in the student's IEP . . . as no related service providers were available to provide the services."<sup>276</sup> The charter school district had until the end of May 2013 to submit in writing the changes the district had made to demonstrate compliance.<sup>277</sup> The district had to implement the changes to ensure that all staff members had been trained to review and revise this particular student's IEP and ensure that other students' IEPs were being implemented.<sup>278</sup> The Muskegon Heights School District had issues with IDEA compliance before it was taken over and turned into Muskegon Heights Public School Academy.<sup>279</sup> The Muskegon Area Intermediate School District, of which Muskegon Heights is a part, was aware of the problems and found the school district was "systematically non-compliant."<sup>280</sup>

Though Muskegon Heights Public School Academy was created to save money for Muskegon Heights, the charter school district may be increasing the costs of other school districts.<sup>281</sup> The neighboring area of Muskegon has seen an influx of special education students since the Muskegon

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COMPLAINT C-7536-13 AGAINST THE MUSKEGON HEIGHTS PUBLIC SCHOOL ACADEMY (2013), <http://mediad.publicbroadcasting.net/p/michigan/files/201305/C-7536-13.pdf>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 5.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 3.

<sup>277</sup> *Id.* at 2, 6–9.

<sup>278</sup> *Id.* at 6–9.

<sup>279</sup> Lindsey Smith, *Despite State Takeover, Special Education Problems Linger for Muskegon Heights Schools*, MICHIGAN RADIO (May 23, 2013), <http://michiganradio.org/post/despite-state-takeover-special-education-problems-linger-muskegon-heights-schools>.

<sup>280</sup> *Id.*

<sup>281</sup> See Lynn Moore, *Muskegon Schools Boss Says Special-Education Students from Muskegon Heights Straining Budget*, MLIVE (Sept. 18, 2013), [http://www.mlive.com/news/muskegon/index.ssf/2013/09/muskegon\\_schools\\_boss\\_says\\_spe.html](http://www.mlive.com/news/muskegon/index.ssf/2013/09/muskegon_schools_boss_says_spe.html) [hereinafter Moore, *Muskegon Schools*].

Heights school district was turned into a charter school district managed by Mosaica.<sup>282</sup> The superintendent of Muskegon Public Schools expressed concern that his district was bearing the financial burden of educating students in special education from Muskegon Heights.<sup>283</sup> Furthermore, Donald Weatherspoon, the Emergency Manager of Muskegon Heights, who turned the public school district into a charter school, articulated concerns about Mosaica during its first year.<sup>284</sup> Problems included hiring teachers that lacked certification, resulting in \$90,000 in fines.<sup>285</sup> Weatherspoon also mentioned that the district needed to work on “expedited reviews” of IEPs for special education students.<sup>286</sup>

According to the regulations implementing IDEA, states must monitor each LEA’s compliance with IDEA, and states have up to a year to rectify noncompliance.<sup>287</sup> If the Secretary of Education determines that a state has issues implementing requirements under IDEA, the Secretary can take various measures.<sup>288</sup> Possible measures include taking back funding, cutting off funding, supplying other resources to help the state in its implementation of its plan, or referring the matter to the Department of Justice.<sup>289</sup> As of July 31, 2013, the Michigan Department of Education Office of Special Education had received 295 complaints, an increase from the previous year.<sup>290</sup> Of the 162 reports issued, with other complaints being

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<sup>282</sup> *Id.* Legislation in 1996 allowed for interdistrict choice. Arsen & Ni, *supra* note 208, at 9. Parents may choose to send their child to a school outside of their home district. *Id.* While the new school district may not to accept the child, the home school district is not able to prevent the child from leaving. *Id.*

<sup>283</sup> Moore, *Muskegon Schools*, *supra* note 281. The superintendent “said he can’t help but think that Muskegon is being saddled with the costs of educating students from a community that has a ‘charter school system that people don’t like.” *Id.* Additionally, the superintendent stated, “It hasn’t been desirable for people who have special-needs children.” *Id.*

<sup>284</sup> Lynn Moore, *Pressure on Mosaica to Improve Muskegon Heights Schools Growing, Documents Show*, MLIVE (Sept. 6, 2013), [http://www.mlive.com/news/muskegon/index.ssf/2013/09/pressure\\_on\\_mosaica\\_to\\_improve.html](http://www.mlive.com/news/muskegon/index.ssf/2013/09/pressure_on_mosaica_to_improve.html).

<sup>285</sup> *Id.*

<sup>286</sup> Lynn Moore, *Muskegon Heights Schools Need “Numerous” Improvements, Emergency Manager Says in Live Chat*, MLIVE (June 6, 2013), [http://www.mlive.com/news/muskegon/index.ssf/2013/06/muskegon\\_heights\\_schools\\_need.html](http://www.mlive.com/news/muskegon/index.ssf/2013/06/muskegon_heights_schools_need.html) [hereinafter Moore, *Muskegon Heights*].

<sup>287</sup> 34 C.F.R. § 300.600 (2013).

<sup>288</sup> See 34 C.F.R. § 300.604.

<sup>289</sup> *Id.*

<sup>290</sup> MICH. DEP’T OF EDUC., OFFICE OF SPECIAL EDUCATION 2013 UPDATE, 9 (2013), [www.michigan.gov/documents/mde/2013\\_OSE\\_Update\\_430438\\_7.pdf](http://www.michigan.gov/documents/mde/2013_OSE_Update_430438_7.pdf).

withdrawn, dismissed, or incorporated into other complaints, 118 of the complaints found noncompliance with twenty-two reports still pending.<sup>291</sup> Therefore, Michigan is receiving and responding to the complaints made regarding special education services.<sup>292</sup>

IDEA places special education responsibilities in the hands of the LEA.<sup>293</sup> Therefore, if a charter school is the LEA, then the single school has the responsibility to provide identification of students, IEP creation, and services.<sup>294</sup> States must monitor compliance and risk losing federal funding if schools do not rectify non-compliance issues.<sup>295</sup> Due to the size and resources of charter schools, providing special education services proves challenging.<sup>296</sup>

#### V. POSITIVE CHANGES THROUGH NEW LEGISLATION AND ACTIVE PARTICIPATION

Because Michigan's all-charter school districts are only into their fourth year, the state lacks data to help determine what issues are present and how to correct them.<sup>297</sup> However, there are reports of issues regarding implementing IEPs and providing appropriate accommodations and related services<sup>298</sup> as well as parents moving their children to the neighboring district to receive special education services.<sup>299</sup> Because the public school academies in Michigan are charter schools, they are likely to have the same issues that other charter schools have encountered.<sup>300</sup> In this case, however, children will be in a unique position, since they will not have another neighborhood, non-charter public school to attend.<sup>301</sup> To ensure that students with disabilities in all-charter school districts receive appropriate services, IDEA must be amended to require these

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<sup>291</sup> *Id.*

<sup>292</sup> *See id.*

<sup>293</sup> Gleason, *supra* note 14, at 146.

<sup>294</sup> *Id.* at 158.

<sup>295</sup> *See supra* notes 287–289 and accompanying text.

<sup>296</sup> *See supra* notes 263–265 and accompanying text.

<sup>297</sup> *See Ash, supra* note 10, at 12.

<sup>298</sup> Smith, *supra* note 279 (“State investigators found school staff were told to say students didn’t need [social work] services because the district couldn’t provide them.”)

<sup>299</sup> Moore, *Muskegon Schools, supra* note 281.

<sup>300</sup> *See Garda, supra* note 28, at 686–88.

<sup>301</sup> *See Ash, supra* note 10, at 12.

charter schools to be part of an LEA, so they are able to benefit from both resources and oversight.<sup>302</sup>

A. *Legislation Changes for All-Charter School Districts*

Education historically has been left to the states and the local government with little interest from the federal government.<sup>303</sup> However, since 1975, the federal government has set standards for states and local school districts in the area of special education.<sup>304</sup> Though federal law, the IDEA restricts states and school districts in various ways.<sup>305</sup> Currently, IDEA mandates certain requirements related to providing special education services, but the requirements relating to charter schools are contingent upon the states' charter school laws.<sup>306</sup> To truly fulfill the purpose of IDEA and provide a free appropriate public education for all students, charter schools in all-charter school districts must be given the ability to effectively provide services for students with disabilities.<sup>307</sup> To make that a national reality, IDEA should prohibit charter schools from operating as their own LEA when the entire public school district is composed of charter schools.<sup>308</sup>

Currently, IDEA defines LEA without including charter schools, but makes references to charter schools<sup>309</sup> that operate as an LEA throughout the statute.<sup>310</sup> Where LEA is defined, a

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<sup>302</sup> See *infra* Part IV.A.

<sup>303</sup> See CRC PUBLIC EDUCATION, *supra* note 12, at 1.

<sup>304</sup> Huefner, *supra* note 47. Congress determined that the Education for All Handicapped Children Act, IDEA's predecessor, was a justified encroachment on the traditionally, state-controlled realm of education because children with disabilities were being inadequately educated or excluded from public education. Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 451–53 (2004).

<sup>305</sup> See 20 U.S.C. § 1412 (2012) (outlining the responsibilities of states for child find and the provision of free appropriate public education in order to receive federal funding).

<sup>306</sup> See 20 U.S.C. § 1413(e)(1)(B) (removing charter schools from the requirement to jointly establish their eligibility to maintain special education programs due to their size unless that state allows them).

<sup>307</sup> Rhim & McLaughlin, *supra* note 165, at 8.

<sup>308</sup> Garda, *supra* note 28, at 661 (proposing that IDEA could be amended to prohibit charter schools from operating as independent local educational agencies and that state law should require charter schools to operate under educational service agencies).

<sup>309</sup> 20 U.S.C. § 1401(19) (defining local educational agency).

<sup>310</sup> See, e.g., 20 U.S.C. § 1411(e)(3)(A)(i).

subsection should explicitly state that for the purposes of IDEA, a charter school operating within an all-charter school district may not operate as an LEA.<sup>311</sup> With the all-charter school districts unable to act as LEAs, they would be required to be part of another LEA.<sup>312</sup> Because charter schools are smaller, they tend to have less money and cannot spread out the extra costs of special education.<sup>313</sup> For example, special education costs in Michigan were about twice as much as general education.<sup>314</sup> Additionally, the new charter districts are operating on much smaller budgets, leaving less money to supplement special education resources.<sup>315</sup> Moreover, in Michigan when special education resources have exhausted their state and federal allocations, if more money is still needed, it must come from the general education fund, further straining a tight budget.<sup>316</sup> By becoming part of another LEA, all-charter district schools would also be able to share resources with the other schools within the LEA, resulting in less of a financial burden on the charter school to deliver special education services.<sup>317</sup> With fewer budgeting constraints on the district, there would be less incentive to cut services.<sup>318</sup>

Since attending a charter school in an all-charter school district will no longer truly optional, parents must have assurance that the charter school in their district will provide their child a free appropriate public education.<sup>319</sup> One solution is to ease the funding concerns related to special education services, so charter school districts have fewer incentives to provide inadequate services.<sup>320</sup> When charter schools are part of an LEA, the LEA can provide more oversight and training for educators on the importance of identification of and services for

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<sup>311</sup> 20 U.S.C. § 1401(19) (defining local educational agency).

<sup>312</sup> See Garda, *supra* note 28, at 699.

<sup>313</sup> *Id.*; Rhim & McLaughlin, *supra* note 165, at 8 (explaining that charter schools have reduced special education services or kept students within the general education classroom and provided tutoring or consultative services after school due to insufficient funds to hire more special education teachers).

<sup>314</sup> See *supra* note 26.

<sup>315</sup> See *supra* text accompanying note 117.

<sup>316</sup> CRC FINANCING SPECIAL EDUCATION, *supra* note 26, at 11.

<sup>317</sup> See Garda, *supra* note 28, at 699.

<sup>318</sup> *Id.*

<sup>319</sup> 20 U.S.C. § 1400(c)(3) (2012) (finding that since the EAHCA's existence, the law has been successfully ensuring that each child receives a "free appropriate public education").

<sup>320</sup> Garda, *supra* note 28, at 699.

students with disabilities.<sup>321</sup> Some charter schools do very well in identification of students with disabilities, while others choose not to identify a child with a disability because they do not want to label the child.<sup>322</sup> IDEA mandates identification of students because it is the first step in determining what resources the school should provide to give an appropriate education to the child.<sup>323</sup> Therefore, by providing oversight, the LEA can ensure that the charter school identifies children with disabilities and help provide the necessary resources to the charter school while complying with federal law.<sup>324</sup>

In order to adequately provide services to students with disabilities, a charter school must have the resources and understand the legal and educational requirements necessary to provide special education services.<sup>325</sup> Because a new charter school has not been providing special education resources, the school may lack the expertise it needs to implement IEPs.<sup>326</sup> Research has demonstrated that charter schools benefit when connected with a system that can provide support services for special education through a local or intermediate district.<sup>327</sup> Therefore, requiring the charter schools to be part of an LEA will help deliver special education services.<sup>328</sup> In fact, charter schools have already voluntarily grouped together, pooling their resources to provide special education services.<sup>329</sup> Thus, working within the LEA to implement IDEA would not be a far reach.<sup>330</sup> The charter school district could benefit from the bureaucracy already in place, which has a history of delivering

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<sup>321</sup> *Id.* at 699–700.

<sup>322</sup> *See* FIORE, *supra* note 181, at 21.

<sup>323</sup> *See supra* note 270.

<sup>324</sup> *See supra* notes 257–262 and accompanying text.

<sup>325</sup> *See* Rhim & McLaughlin, *supra* note 165, at 8.

<sup>326</sup> *Id.* (quoting C.E. FINN ET AL., CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 159 (2000)).

<sup>327</sup> *Id.* at 9.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* Recently the National Alliance for Public Charter Schools released a report recommending that charter schools utilize their autonomy to better serve students with disabilities. LAUREN MORANDO RHIM & PAUL O'NEILL, IMPROVING ACCESS AND CREATING EXCEPTIONAL OPPORTUNITIES FOR STUDENTS WITH DISABILITIES IN PUBLIC CHARTER SCHOOLS 4–5 (2013), [http://www.publiccharters.org/data/files/Publication\\_docs/Special%20Education%20in%20Charter%20Schools\\_20131021T154812.pdf](http://www.publiccharters.org/data/files/Publication_docs/Special%20Education%20in%20Charter%20Schools_20131021T154812.pdf). The report also recommended that public charter schools work with other public charter schools and school districts to alleviate the cost to charter schools. *Id.* at 29.

<sup>330</sup> *See id.*

special education services.<sup>331</sup>

Professor Robert Garda suggested a variety of ways to change federal and state law to ensure the students with disabilities are provided a free appropriate public education while attending charter schools.<sup>332</sup> He proposed, among other options at the federal level, to amend IDEA to prohibit charter schools from being separate LEAs.<sup>333</sup> As a result, every charter school would have to join an LEA or an educational service agency.<sup>334</sup> This change would result in charter schools being treated similarly to small districts, which have to link together to receive funding and provide special education services.<sup>335</sup> While this would solve the issue of charter schools functioning as their own LEA, this change would also remove a significant amount of autonomy from every charter school nationally.<sup>336</sup>

Rather than requiring every charter school to be part of an LEA, IDEA should first require all-charter school districts to be part of an LEA.<sup>337</sup> While this solution is similar to what Garda recommends, it is less drastic and deals with a more urgent situation.<sup>338</sup> Requiring all-charter districts to become part of an LEA would be a smaller alteration to the existing law while also not affecting every charter school throughout the country. This change would only affect certain charter schools in areas where parents no longer have a choice to send their child to a traditional public school, so it would be more likely to garner support. By having the all-charter district schools join an LEA, the schools could benefit from shared special education resources, thus removing many of the financial hurdles that many charter schools find when trying to provide services.<sup>339</sup>

Though all students with disabilities should be able to

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<sup>331</sup> Garda, *supra* note 28, at 699–700.

<sup>332</sup> *Id.* at 694–717.

<sup>333</sup> *Id.* at 698. Other federal options that Garda proposes are reinstating an earlier provision that prohibited an LEA from receiving IDEA funds if it was to receive less than \$7,500 unless it created special education programs with another LEA or allowing the state educational agency to determine that a charter school is unable to fulfill its duties regarding special education independently then it must create a joint program with other small LEAs. *Id.* at 697–98.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> See *infra* text accompanying notes 338–341.

<sup>338</sup> See *supra* Part III.

<sup>339</sup> See FIORE, *supra* note 181, at 42; Garda, *supra* note 28, at 699.

benefit from their charter schools being part of an LEA, students in districts such as Highland Park and Muskegon Heights are in a unique and critical situation.<sup>340</sup> These children do not have the option of choosing the charter school over a traditional public school; instead, they must attend the charter school if they want to attend a public school in their neighborhood.<sup>341</sup> Due to Michigan's unique system of intermediate school districts, Muskegon Heights and Highland Park do have some oversight and pooling of resources for special education services.<sup>342</sup> However, even with the oversight, Muskegon Heights has had difficulty with IDEA compliance.<sup>343</sup> Michigan may be the first state to allow for all-charter districts to replace traditional public school districts, but other states could soon follow as they struggle with financing education.<sup>344</sup> Students in other states may face similar prospects of attending all-charter school districts that are their own LEA.<sup>345</sup> Without the shared resources and knowledge from an existing LEA, children may not have appropriate special education resources.<sup>346</sup> Though it seems that Michigan is in the forefront of this all-charter district movement, other countries have implemented different public-private hybrid education models, including charter schools.<sup>347</sup> As a result, it is possible that other states may continue to move in this direction as well.<sup>348</sup> Rather than waiting for potentially more children to be disserved, the federal law should be proactive and get in front of the issue, ensuring more pooling of resources and oversight. Therefore, all-charter school districts should not be given the option to join an LEA; it should be mandatory.<sup>349</sup>

Admittedly, modifying IDEA would constrain local decision making since it would be a change at the federal level, while

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<sup>340</sup> See *supra* Part III.

<sup>341</sup> See *supra* note 10.

<sup>342</sup> See *supra* notes 85–92 and accompanying text.

<sup>343</sup> See *supra* notes 272–286 and accompanying text.

<sup>344</sup> See *supra* note 11 and accompanying text.

<sup>345</sup> With eleven states other than Michigan that allow the charter school to be its own LEA, including Ohio, New Jersey, and Indiana, other states that choose to convert to all-charter districts could leave many children without resources and an appropriate education. Rhim et al., *supra* note 191, at 56.

<sup>346</sup> See *supra* Part III.

<sup>347</sup> See PATRINOS ET AL., *supra* note 33.

<sup>348</sup> See *supra* note 345 and accompanying text.

<sup>349</sup> See *supra* notes 341–348 and accompanying text.

historically education has been handled locally.<sup>350</sup> Rather than each state deciding whether to allow a charter school to be its own LEA, this change would require every all-charter district to join an LEA.<sup>351</sup> Thus, the state would no longer have discretion in this specific situation. However, Congress decided in 1975 that students with disabilities were being systematically disserved, justifying federal action.<sup>352</sup> Additionally, local control is already restricted similarly in terms of small LEAs that must group together in order to receive federal funding through IDEA.<sup>353</sup> For almost forty years, the federal government has legislated and provided oversight for special education services, so the local control argument is not a strong justification for failing to protect students with disabilities in all-charter school districts.<sup>354</sup>

### *B. Parents as Advocates for Their Children*

While legislation requiring that charter schools are part of an LEA is an important change, schools must do more to ensure that parents are informed about special education services, letting parents advocate for their children to receive the entitled services.<sup>355</sup> Often parents are not seen as concerned for their child's effective education.<sup>356</sup> Instead, they may be viewed as roadblocks or as inappropriately pushing for special treatment even though "virtually all stakeholders in elementary, middle school, and secondary education—teachers, parents, researchers and policy-makers—tout the value of school-family partnerships as an important remedy for school education."<sup>357</sup>

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<sup>350</sup> See *supra* note 46 and accompanying text.

<sup>351</sup> See 20 U.S.C. § 1413(e)(1)(B) (2012) (removing charter schools from the requirement to jointly establish their eligibility to maintain special education programs due to their size unless their state allows them).

<sup>352</sup> See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773.

<sup>353</sup> See *supra* notes 248–251 and accompanying text.

<sup>354</sup> See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

<sup>355</sup> See *infra* notes 361–367 and accompanying text.

<sup>356</sup> MICH. DEP'T OF EDUC., WHAT RESEARCH SAYS ABOUT PARENT INVOLVEMENT IN CHILDREN'S EDUCATION: IN RELATION TO ACADEMIC ACHIEVEMENT 1 (2001), [http://michigan.gov/documents/Final\\_Parent\\_Involvement\\_Fact\\_Sheet\\_14732\\_7.pdf](http://michigan.gov/documents/Final_Parent_Involvement_Fact_Sheet_14732_7.pdf) (naming the lack of parent involvement as one of the biggest issues in public schools).

<sup>357</sup> The emergence of the "helicopter parent" and their effect on a child's well-being perpetuates the notion that parents are viewed as too involved in their children's

The process for creating IEPs and ensuring their implementation must be more accessible to parents, and this begins by knowing about the process and its purpose.<sup>358</sup> Therefore, when parents enroll their children in an all-charter school district, the school should give them a document explaining that their child is entitled to receive special education resources if the child qualifies under IDEA and state law.<sup>359</sup> The document should explain that identifying a child with a disability is for the purpose of equipping the child with resources to help him or her receive an appropriate education, so parents understand that schools are not just *labeling* their child.<sup>360</sup>

IDEA and state law require parents to be part of the process in determining whether their child has a disability and what the IEP should entail.<sup>361</sup> However, parents are still unaware that their child is allowed to go to a charter school and receive special education resources.<sup>362</sup> Parents are being told not to have their children attend charter schools, and sometimes parents are not informing charter schools that their child has an IEP.<sup>363</sup> These situations are problematic. Parents have unique insights into their child and can ensure continuity from year to year and school to school.<sup>364</sup> With schools and districts responsible for thousands of students, parents must advocate for their child to ensure their child receives all of the necessary services.<sup>365</sup> Parents will be better able to confirm their child receives an appropriate education by knowing that

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lives. RICK SHOUP ET AL., HELICOPTER PARENTS: EXAMINING THE IMPACT OF HIGHLY INVOLVED PARENTS ON STUDENT ENGAGEMENT AND EDUCATIONAL OUTCOMES 7 (2009), <http://cpr.iub.edu/uploads/AIR%202009%20Impact%20of%20Helicopter%20parents.pdf>. See generally David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166 (1991) (explaining the findings of the ethnographic study done on families in New York in the years 1987–1988, who participated in individual education program meetings for their children under the Education for All Handicapped Children Act).

<sup>358</sup> See Phillips, *supra* note 66, at 1836–37 (arguing that parents are not always able to advocate for their children in special education due to a lack of resources and understanding of the process and requirements).

<sup>359</sup> See *id.*

<sup>360</sup> See *id.*

<sup>361</sup> 34 C.F.R. § 300.308, 321 (2013).

<sup>362</sup> See *supra* Part II.A.

<sup>363</sup> See *supra* Part II.A.

<sup>364</sup> See Emily Buss, Essay, “*Parental*” Rights, 88 VA. L. REV. 635, 647 (2002) (arguing that children are served by a legal system that shows deference to parents).

<sup>365</sup> See Phillips, *supra* note 66, at 1814–15 (2008).

their child has the right to services while attending a charter school and being an active part of the IEP development and implementation.<sup>366</sup> Additionally, parents will be in a better position to monitor their child's IEP and file complaints, if necessary.<sup>367</sup> Parents can act as another check on the all-charter school districts to certify their children's IEPs are updated annually and services are provided.<sup>368</sup>

*C. Charter Schools Can Retain Autonomy and Demonstrate a Commitment to Accountability by Providing Special Education Services*

Charter schools are viewed as viable options that will aid school districts in fiscal crisis; therefore, families are drawn to new charter schools.<sup>369</sup> When a family is unhappy with their current public school, it can turn to a charter school, which is premised upon autonomy, accountability, and choice.<sup>370</sup> One could argue that charter schools, even those making up the entire public school system in a district, should be exempt from legislation requiring special education services because of the increased amount of autonomy this would give the schools.<sup>371</sup> The increased freedom for designing programs and allocating money would allow charter schools to innovate.<sup>372</sup> By allowing charter schools to create different and competitive programs, public schools would have to improve or close—the basic idea of market accountability.<sup>373</sup> A charter school must follow the LEA's plan for educating students with special needs when the charter school becomes part of an existing LEA, even if the plan conflicts with the charter school's identity, restricting the

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<sup>366</sup> See Engel, *supra* note 357, at 188; Phillips, *supra* note 66, at 1815–16.

<sup>367</sup> See Phillips, *supra* note 66, at 1847–52 (suggesting potential ways that parents could be aided in their advocacy for the child regarding special education services since many parents are not fluent in the requirements of special education law).

<sup>368</sup> See *supra* notes 61–67 and accompanying text.

<sup>369</sup> Danielle Arndt, *New Ypsilanti-area Charter School Turns Away 670 Enrollees for First Year*, THE ANN ARBOR NEWS (Aug. 21, 2012), <http://www.annarbor.com/news/education/new-ypsilanti-area-charter-school-turns-away-670-enrollees-for-first-year>.

<sup>370</sup> Garda, *supra* note 28, at 662–63.

<sup>371</sup> See RHIM & O'NEILL, *supra* note 329, at 10.

<sup>372</sup> *Id.* See Chester E. Finn Jr., *Beating Up on Charter Schools*, N.Y. TIMES, Aug. 24, 1996, at 23 (arguing that charter schools are challenging the public school system and unions with innovation and accountability).

<sup>373</sup> See Garda, *supra* note 28, at 667.

school's autonomy and innovation potential.<sup>374</sup>

While charter schools are given a great deal of freedom in return for performance accountability, charter schools are public schools funded with public money.<sup>375</sup> As such, they have the responsibility to educate all students.<sup>376</sup> If the entire district is a charter school, then the charter school, as the only option for public education within the district, has the responsibility to provide a free appropriate public education to each child within its borders.<sup>377</sup> Though charter schools already have increased autonomy, it is not synonymous with exemption from federal statutes related to students with disabilities.<sup>378</sup>

In Michigan, Muskegon Heights and Highland Park switched their school districts to all-charter school districts to save money.<sup>379</sup> The challenge for those districts and others that may follow will be to create a fiscally responsible charter school district with a smaller budget while still providing special education services.<sup>380</sup> The districts will not truly achieve their goal if removing special education services is how the charter school district saves money. Muskegon Heights has already had issues with providing special education services, causing students to leave the district and putting a financial strain on the neighboring district.<sup>381</sup> This issue conflicts with the principle of accountability on which charter schools pride themselves.<sup>382</sup> By requiring all-charter school districts to be part of LEAs to provide special education services, resources will be shared, resulting in more flexibility for the charter school to focus on other ways to improve education.<sup>383</sup> Public schools educated students with disabilities for almost twenty years before charter schools existed, an experience which could prove helpful to new charter schools.<sup>384</sup>

Setting aside legal considerations, providing students with

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<sup>374</sup> RHIM & O'NEILL, *supra* note 329, at 10.

<sup>375</sup> *See supra* note 159.

<sup>376</sup> *Id.*

<sup>377</sup> *See* 20 U.S.C. § 1413(a)(5) (2012); Rhim & McLaughlin, *supra* note 165, at 1, 3.

<sup>378</sup> *See* Heubert, *supra* note 160.

<sup>379</sup> Arsen & Mason, *supra* note 10.

<sup>380</sup> *See supra* notes 121–123, 216–223 and accompanying text.

<sup>381</sup> *See supra* notes 272, 282 and accompanying text.

<sup>382</sup> *See supra* note 158 and accompanying text.

<sup>383</sup> *See* Rhim & McLaughlin, *supra* note 165, at 8.

<sup>384</sup> Huefner, *supra* note 47; Brown-Nagin, *supra* note 168.

appropriate educational services benefits students and the public.<sup>385</sup> Unaddressed special education needs are one of the common factors shared by students who are truant.<sup>386</sup> Moreover, a disproportionate percentage of juveniles in the justice system have disabilities that would qualify them for special education services.<sup>387</sup> Many of the juveniles first entered the justice system through truancy or other status offenses after falling behind in school due to an unaddressed disability.<sup>388</sup> Therefore, ensuring that all students receive a free appropriate public education will benefit society in general.<sup>389</sup> All students would receive an appropriate education, creating productive citizens and removing one contributing factor to truancy and other delinquent behavior.<sup>390</sup>

## VI. CONCLUSION

Many school systems are in crisis due to a need to improve educational programs while simultaneously facing funding issues.<sup>391</sup> However, in the rush to fix these problems, students with special needs may be pushed aside.<sup>392</sup> In Michigan, where two school districts have been converted into all-charter school districts, students who qualify for special education services may not be receiving the services to which they are entitled.<sup>393</sup> The all-charter school district has become a reality in Michigan, and other states may make the same change, leaving students vulnerable.<sup>394</sup> All students deserve a free appropriate

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<sup>385</sup> See *Truancy Fact Sheet*, *supra* note 31.

<sup>386</sup> *Id.* Truancy was viewed as such an important issue to eradicate that in Wayne County, Michigan, the juvenile division of the prosecutor's office had a program aimed at educating both parents and children about the importance of education before there were lasting legal repercussions. WAYNE CNTY. PROSECUTOR'S OFFICE, ERASE TRUANCY AND PROSECUTOR'S ABOLISH CHRONIC TRUANCY (PACT): PROGRAM OVERVIEW, [http://swmcdn.com/site\\_0348/DEA\\_TruancyProgramOverview.pdf](http://swmcdn.com/site_0348/DEA_TruancyProgramOverview.pdf). The program was cut in the summer of 2013 due to budget constraints.

<sup>387</sup> See *supra* note 147 and accompanying text.

<sup>388</sup> See *supra* notes 150–153 and accompanying text.

<sup>389</sup> See *supra* notes 150–153 and accompanying text; *Truancy Fact Sheet*, *supra* note 31.

<sup>390</sup> See *supra* notes 150–153 and accompanying text; *Truancy Fact Sheet*, *supra* note 31.

<sup>391</sup> See *supra* note 6 and accompanying text.

<sup>392</sup> See *supra* Part II.C.

<sup>393</sup> See *supra* notes 272–286 and accompanying text.

<sup>394</sup> See *supra* text accompanying notes 345–349.

public education, and greater oversight is necessary to ensure this happens in all-charter school districts.<sup>395</sup> To facilitate that oversight, and ensure that all-charter districts have the resources to provide services to their students with disabilities, IDEA should require all-charter school districts to be part of an LEA.<sup>396</sup> Because parents lose their choice between public schools and charter schools, all-charter school districts have a greater responsibility to ensure that students with disabilities receive a free appropriate education.<sup>397</sup> By informing parents of their right to special education resources and requiring all-charter school districts to be part of an LEA, that free appropriate education may become a reality for more children.<sup>398</sup>

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<sup>395</sup> See *supra* notes 48–49 and accompanying text.

<sup>396</sup> See *supra* Part IV.A.

<sup>397</sup> See *supra* text accompanying notes 375–384.

<sup>398</sup> See *supra* Part IV.